

## **complaint**

Mr S has complained about payday loans Express Finance (Bromley) Limited (trading as "Payday Express") gave him between February 2014 and May 2014. He's said Payday Express gave him loans which it shouldn't have because he didn't have the financial means to repay them.

## **background**

I attach my provisional decision of 19 September 2017, which forms part of this final decision and should be read in conjunction with it. In my provisional decision I explained why I was intending to uphold Mr S's complaint. I invited both parties to provide any further comments they may have had before I reached a final decision.

Mr S confirmed he agreed with my provisional decision and that he had nothing further to add. And Payday Express didn't provide anything further for me to think about either.

## **my findings**

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

As neither party has disputed my findings or asked me to look at anything else, I see no reason to alter the conclusions I reached in my provisional decision of 19 September 2017.

## **my final decision**

For the reasons set out above and in my provisional decision of 19 September 2017, I'm upholding Mr S' complaint.

Express Finance (Bromley) Limited (trading as Payday Express) should pay Mr S compensation in line with the instructions set out in my provisional decision of 19 September 2017.

Under the rules of the Financial Ombudsman Service, I am required to ask Mr S to accept or reject my decision before 9 November 2017.

Jeshen Narayanan  
**ombudsman**

## COPY OF PROVISIONAL DECISION

### complaint

Mr S has complained about payday loans Express Finance (Bromley) Limited (trading as "Payday Express") gave him between February 2014 and May 2014. He's said Payday Express gave him loans which it shouldn't have because he didn't have the financial means to repay them.

### background

Mr S took four loans in total with Payday Express. As far as I can see his borrowing history is as follows:

- Loan one taken in February 2014 for £330
- Loan two taken in March 2014 for £240
- Loan three taken in April 2014 for £320
- Loan four taken in May 2014 for £270

Mr S also initially complained Payday Express incorrectly said he hadn't repaid loan one. But I've separately explained why we can't look into that complaint. So this decision is only looking at whether Payday Express should've been given Mr S these loans. But any compensation will take into account that I have to treat any debt on loan one as outstanding because I can't look at Mr S' complaint he repaid it.

One of our adjudicators looked at Mr S' complaint. He thought Payday Express' checks before giving these loans weren't proportionate and that proportionate checks would've stopped it from giving these loans to Mr S. Payday Express didn't accept our adjudicator's view in full and asked for an ombudsman's decision.

### my provisional findings

I've considered all the available evidence and arguments to provisionally decide what's fair and reasonable in the circumstances of this complaint. We've explained how we handle complaints about short term lending on our website. And I've used this approach to help me provisionally decide Mr S' complaint.

Having carefully thought about everything I've been provided with, I'm intending to uphold Mr S' complaint. I'd like to explain why in a little more detail.

#### *the relevant guidance in place at the time of the loans*

Payday Express gave loans one and two to Mr S during the period it held a standard licence from the Office of Trading ("OFT"), which enabled it to carry out consumer credit activities. And the OFT guidance in place at the time clearly set out the responsibility of a lender to take reasonable steps to ensure a borrower could *sustainably* repay their loan or loans before agreeing to any borrowing.

The OFT guidance specifically states "*Assessing affordability' is a borrower-focussed test which involves a creditor assessing a borrower's ability to undertake a specific credit commitment, or specific additional credit commitment, in a sustainable manner, without the borrower incurring (further) financial difficulties.*" The guidance goes on say that repaying credit in a sustainable manner means being able to repay credit "*out of income and/or available savings.*"

It then goes onto to say "*The purpose of payday loans is to act as a short-term solution to temporary cash flow problems experienced by consumers. They are not appropriate for supporting sustained borrowing over longer periods, for which other products are likely to be more suitable.*" And finally it says that "*The creditor should take a view on what is appropriate in any particular circumstance dependent on, for example, the type and amount of the credit being sought and the potential risks to the borrower.*"

Mr S was given loans three and four while Payday Express was regulated by the Financial Conduct Authority ("FCA"). The relevant regulatory rules in place at the time were set out in the Consumer Credit Sourcebook ("CONC") section of the FCA Handbook of rules and guidance.

Section 5.2.1(2) of CONC set out what a lender needed to do before agreeing to give a consumer a loan of this type. And it says a firm had to consider "*the potential for the commitments under the regulated credit agreement to adversely impact the customer's financial situation*" as well as "*the ability of the customer to make repayments as they fall due over the life of the regulated credit agreement.*"

CONC 5.2 also includes some guidance on the sorts of things a lender needs to bear in mind when considering its obligations under CONC 5.2.1. Section 5.2.4(2) says "*a firm should consider what is appropriate in any particular circumstances dependent on, for example, the type and amount of credit being sought and the potential risks to the customer. The risk of credit not being sustainable directly relates to the amount of credit granted and the total charge for credit relative to the customer's financial situation.*"

And CONC 5.3 contains further guidance on what a lender should bear in mind when thinking about affordability. CONC 5.3.1(1) says "*In making the creditworthiness assessment or the assessment required by CONC 5.2.2R (1), a firm should take into account more than assessing the customer's ability to repay the credit.*"

CONC 5.3.1(2) then says "*The creditworthiness assessment and the assessment required by CONC 5.2.2R (1) should include the firm taking reasonable steps to assess the customer's ability to meet repayments under a regulated credit agreement in a sustainable manner without the customer incurring financial difficulties or experiencing significant adverse consequences.*"

In practice all of this meant that a lender had to take proportionate steps to ensure a consumer would've been able to repay what they were borrowing in a sustainable manner without it adversely impacting on their financial situation. Put simply the lender had to gather enough information so that it could make an informed decision on the lending.

Although the guidance and rules themselves in place at the relevant times didn't set out compulsory checks, they did list a number of things (in Section 5.2.4 of CONC and in the OFT guidance) a lender could take into account before agreeing to lend. The key thing was that the rules required a lender's checks to be proportionate. And any checks had to take into account a number of different things, such as how much was being lent and when what was being borrowed was due to be repaid.

I've kept all of this in mind when thinking about whether Payday Express did what it needed to before agreeing to Mr S' loans. Mr S was given loans where there was an expectation (at the outset at least) that the capital borrowed plus the interest due was to be repaid in a single payment. So the checks Payday Express carried out had to provide enough for it to be able to understand whether Mr S would be able to make these payments when they fell due.

Payday Express says it completed a credit search. It also says Mr S was asked for details of his income and expenditure. It has provided the details of what it recorded at the respective times. Payday Express says that it was reasonable for it to agree to lend based on the information it gathered.

*why I don't think Payday Express' checks were proportionate*

I've thought about what Payday Express has provided and what it has said. But having done so, I think it would've been proportionate for Payday Express to have carried out further checks before it agreed to give these loans to Mr S.

I want to start by saying that I agree where there's no obvious reason for it to do so and where it would be disproportionate to, I wouldn't expect a lender to question the information a consumer has provided. And where that's the case, I think it's perfectly reasonable for a lender to accept the information provided at face value.

But in this instance, given the other information Payday Express had available I think it had reason to question the information provided. And I think it would've been proportionate to carry out more checks before agreeing to these loans.

To explain, it looks like Mr S said that he didn't have any expenditure at all when he applied for loan one. Leaving aside my concerns about whether it was reasonable for Payday Express to believe that an adult applying for credit had no expenditure whatsoever, I think it had specific grounds to suspect this information might've been unrealistic, given its credit check is also likely to have shown that Mr S had outstanding credit commitments.

I'm also mindful that the total amount Mr S was committing to repay was around 40% of his monthly income. And, in these circumstances, I think it would've been proportionate to have carried out further enquiries into why Mr S needed to borrow these funds if he had the whole of his salary available to him as disposable income.

Given the sheer number of unanswered questions there were in the information gathered, I don't think that the checks Payday Express carried out before it gave Mr S these loans were proportionate.

*what I think proportionate checks would most likely have shown*

Even though I don't think that the checks Payday Express carried out were proportionate and sufficient, this doesn't, on its own, mean that Mr S' complaint should be upheld.

After all if further checks would've simply shown Payday Express that Mr S would most likely have been able to repay these loans when they became due (and so there was no reason why Payday Express shouldn't have lent to Mr S), then further checks wouldn't have made a difference. This is because Mr S won't have lost out as a result of Payday Express' failure to carry out proportionate checks and there'd be no reason for me to uphold the complaint.

But if further checks would most likely have shown that Mr S was unlikely to have been able to repay the loans when they became due then Payday Express would've seen that it shouldn't have lent to him. And this would mean that Mr S lost out because of Payday Express' failure to carry out proportionate checks. So there'd be grounds to uphold Mr S' complaint.

As proportionate checks weren't carried out I can't say for sure what they would've shown. But Mr S' provided us with evidence of his financial circumstances at the time he applied for the loans. So I've been able to get a picture of what his financial circumstances were like. Of course I accept this isn't perfect as different checks show different things. And just because something shows up in the information Mr S' provided it doesn't mean it would've shown up in any checks Payday Express might've carried out. But in the absence of anything else I think it's perfectly reasonable to rely on what Mr S has provided.

I've carefully looked through everything Mr S has provided and I've also thought about everything both parties have said. Having done so, I don't think Mr S had the capacity to take on any of these loans.

In this case, I think proportionate checks would've extended into finding out more about Mr S' outgoings. And given the unanswered questions I've already referred to, I think steps needed to be taken to verify what Mr S was saying. I think any such checks would've shown that the vast majority of Mr S' income was going towards his normal monthly living costs and his regular financial commitments. Indeed it looks as though Mr S was already paying quite a large amount in planned and unplanned overdraft fees to his bank.

I also think proportionate checks would've shown Payday Express that Mr S was borrowing from multiple lenders. And he was relying on short term loans as well as other forms of unsustainable borrowing to meet his day to day commitments and repay his existing creditors.

In my view, if Payday Express had seen all of this – as I think it would've done if it carried out proportionate checks – it would've realised Mr S was in no sort of position to be able to make the payments he was being asked to make from his income – he simply didn't have the disposable income to be able to do so. So I think proportionate checks here would've shown Payday Express Mr S wasn't in any sort of position to repay these loans. This means I think that not only did Payday Express fail to carry out proportionate checks before giving Mr S these loans, but Mr S also lost out because of this.

### **putting things right - what I'm intending to say that Payday Express needs to do**

To put things right for Mr S, I'm intending to say that Payday Express should:

- refund all the interest and charges on these loans; and
- add interest at 8% per year simple on the above interest and charges from the date they were paid (where they were) to the date of settlement †;
- remove any adverse information recorded on Mr S' credit file as a result of the interest and charges I've referred to above.

†HM Revenue & Customs requires Payday Express to take off tax from this interest. Payday Express must give Mr S a certificate showing how much tax it's taken off if he asks for one.

Payday Express says that there's an outstanding balance on loan one. Mr S has challenged this and has complained about it. But, as I've previously explained, I can't look at Mr S' complaint on this matter. So I have to treat this amount as if it's outstanding.

As I've upheld Mr S' complaint that he shouldn't have been given loan one, Payday Express needs to remove any interest and charges from the amount it says is outstanding on loan one. It can then deduct the amount remaining from what it now needs to pay Mr S.

Just to be clear, if the amount of any outstanding balance (on loan one) – after the interest and charges are removed – is equal to or greater than the interest and charges refund for Mr S' loans this will mean that no compensation is due in this case.

### **my provisional decision**

For the reasons given above, I am intending to uphold Mr S' complaint about Express Finance (Bromley) Limited (trading as Payday Express) and say it should pay Mr S compensation as set out above.

If Mr S or Payday Express have anything further to add before I issue my final decision, they should ensure anything they send reaches me by 3 October 2017.

Jeshen Narayanan  
**ombudsman**