DRN-4407187

Financial Ombudsman Service

The complaint

Mrs R is complaining about Marks & Spencer Financial Services Plc because she says a loan it provided shouldn't have been given to her. She says it was unaffordable because of her existing commitments.

What happened

In July 2022, Mrs R took a personal loan with Marks & Spencer for £7,000. This was set to be repaid over three years with a monthly payment of £224.15. The total to be paid over the term of the loan was £8,069.

Mrs R made normal repayments on the loan until February 2023. She then engaged a debt advice charity and a reduced monthly payment was agreed with Marks & Spencer.

Our investigator concluded the complaint should be upheld. He felt the affordability checks carried out by Marks & Spencer before the loan was agreed showed the repayments wouldn't be affordable for Mrs R. In particular, he noted she was left with virtually no disposable income after the loan was taken into account.

Marks & Spencer didn't accept the investigator's assessment. It provided more information about the nature of the affordability assessment it completed, which it believes met the requirements set by the regulator. As this calculation shows Mrs R's disposable income was higher than the loan repayment, it maintains the loan was affordable.

The complaint has now been referred to me for review.

What I've decided – and why

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Having done so, I've reached the same overall conclusions as the investigator, and for broadly the same reasons. If I haven't commented on any specific point, it's because I don't believe it's affected what I think is the right outcome. In considering this complaint I've had regard to the relevant law and regulations; any regulator's rules, guidance and standards, codes of practice, and what I consider was good industry practice at the time.

Before lending to Mrs R, Marks & Spencer was required to carry out appropriate checks to ensure the repayments were affordable and sustainable. To decide whether this requirement was met, there are two key questions I need to consider:

- Did Marks & Spencer complete reasonable and proportionate checks to establish that Mrs R would be able to repay the loan in a sustainable way?

- If so, was the decision to lend fair and reasonable?
- If not, what would reasonable and proportionate checks have discovered, and would the decision to lend have been fair and reasonable in light of that information?

- Did Marks & Spencer act unfairly or unreasonably in some other way?

The rules, regulations and good industry practice in place at the time the loan was approved required Marks & Spencer to carry out a proportionate and borrower-focused assessment of whether she could afford the repayments. This assessment also had to consider whether the loan could be repaid sustainably. In practice this meant Marks & Spencer had to satisfy itself that making payments to the loan wouldn't cause Mrs R undue difficulty or adverse consequences. In other words, it wasn't enough to simply think about the likelihood of her making payments, it had to consider the impact of the repayments on Mrs R.

The affordability assessment and associated checks also had to be proportionate to the specific circumstances of the application. What constitutes proportionate checks depends on a number of factors including, but not limited to, the particular circumstances of the consumer (for example their financial history, current situation and outlook, and any indications of vulnerability or financial difficulty) and the amount, type and cost of the credit being considered. Even for the same customer, a proportionate check could be different for different applications.

In general, I think a reasonable and proportionate assessment should be more thorough:

- the lower a customer's income, reflecting that it could be more difficult to make repayments from a lower level of income;
- the higher the amount due to be repaid, reflecting that it could be more difficult to meet a higher repayment from a particular level of income;
- the longer the term of the credit, reflecting the fact that the total cost is likely to be greater and the customer is required to make payments for an extended period; and
- the greater the instances and frequency of credit, and the longer the period of time during which a customer has been given credit, reflecting the risk that repeated refinancing may signal borrowing has become unsustainable.

There may also be other factors that could influence how detailed a proportionate check should've been for a given application, including any indications of borrower vulnerability and or foreseeable changes in future circumstances.

Marks & Spencer has described the information it gathered to assess whether Mrs R's loan was affordable before it was approved. This included:

- information contained in her application, including residential status, employment status and her income, which was separately verified;
- information obtained from a credit referencing agency (CRA), giving details of her existing credit arrangements and any past issues with credit, including missed payments and defaults; and
- an expenditure assessment using a combination of modelled data for key expenses such as council tax, utilities, food, clothing, communications, internet, home essentials, travel costs, insurance and wellbeing, along with actual data from the CRA about the cost of her existing credit arrangements.

Marks & Spencer maintains its affordability assessment was proportionate to the credit being given. There were some indicators that it could be argued suggest it should have carried out further checks. For example, I note Mrs R's income was fairly modest compared to the amount of the loan. I also note the credit check showed she had a number of existing credit agreements and had missed a payment in the previous six months. But, on balance, I do think the information it obtained allowed Marks & Spencer to make a fair assessment of whether the loan was affordable.

Where I fundamentally disagree with Marks & Spencer is on the issue of whether its affordability assessment showed the loan was affordable in a sustainable way. Its assessment concluded that, after taking account of her modelled expenditure, Mrs R had a monthly disposable income of £247 before the loan was approved. Once she started making loan repayments, this calculation indicates she'd be left with a monthly disposable income of less than £23.

Marks & Spencer argues this shows the loan was affordable. But I think the fact Mrs R was essentially left with no spare income means it was unlikely to be affordable in a sustainable way. With her income and expenditure so closely matched, she was left with no capacity to deal with any unexpected bills or increases in her essential expenditure and I believe it was always likely she'd struggle to make repayments over the whole three-year term of the loan. And that's exactly how things turned out.

In summary, if Marks and Spencer had adequately assessed whether the loan repayments were sustainable, that is whether they were likely to remain affordable throughout the term of the loan, it's my view it shouldn't have lent to Mrs R. It's for this reason that that I'm upholding this complaint.

I've also considered whether Marks & Spencer treated Mrs R unfairly in some other way that may have disadvantaged her but I don't believe that to have been the case. In particular, I note it responded promptly and agreed a reduced payment when it was told about the difficulties she was having in keeping up repayments.

Putting things right

The principal aim of any award I make must be to return Mrs R to the position she'd now be in but for the errors or inappropriate actions of Marks & Spencer. But that's not entirely possible as the lending provided cannot be undone.

Because I don't think Marks and Spencer should have lent to Mrs R, I don't think it's fair for her to pay interest or charges on the amount she borrowed. But she has had use of the money she was lent, so I think it's fair she repays the amount she borrowed (without the addition of interest or charges).

To put things right, Marks & Spencer now needs to take the following steps:

- Calculate the total of all Mrs R's payments towards the loan.

- If this exceeds the £7,000 she borrowed, any excess above £7,000 should be paid to her with simple interest at 8% per year from the date of each overpayment to the date of settlement.

  HM Revenue & Customs (HMRC) requires Marks & Spencer to deduct tax from any interest. It must provide Mrs R with a certificate showing how much tax has been deducted if she asks for one. That would allow her to reclaim any overpaid tax from HMRC.

- If the total of all Mrs R's payments doesn't exceed the £7,000 she borrowed, it should arrange an affordable payment plan with her for the shortfall.

- Remove any adverse information recorded on Mrs R’s credit file relating to this loan, once any outstanding balance has been repaid.

I’m satisfied this represents a fair and reasonable settlement to this complaint.

My final decision

For the reasons I’ve explained, I’m upholding Mrs R’s complaint. Marks & Spencer Financial Services Plc should now put things right as I’ve set out above.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mrs R to accept or reject my decision before 12 March 2024.

James Biles
Ombudsman