Financial Ombudsman Service

The complaint

Miss H complains that Sainsbury's Bank Plc failed to keep its promise to remove adverse data from her credit report, causing her to miss out on a mortgage deal.

What happened

Miss H used to have a credit card account with Sainsbury's Bank. In April 2021 the bank blocked her credit card because it suspected fraud on the account. Miss H spoke to the bank's fraud team to verify that the relevant payments were genuine, but the decision was not overturned until August, and only after she had complained twice. In August the bank agreed to remove six late payment markers relating to that account from her credit file. The bank told her in writing that it would monitor her account and make sure that it was being reported correctly. (It also wrote off her account balance and paid her some compensation.)

However, those markers were not removed. Miss H discovered this over a year later, in September 2022, when she tried to remortgage her home. She had a fixed rate mortgage with another bank which was due to come to an end in late January 2023. In advance of this happening, she applied for a new fixed rate mortgage with a building society, but after credit checks her application was declined. When she learned that the late payment markers were still showing on her credit file, she complained to Sainsbury's Bank, but it took a month for the late payment markers to be removed from her credit file. Miss H says that meanwhile the interest rate offered by the building society had increased from 3.8% to 5.14%. She couldn't afford that, so she had to get a variable rate mortgage instead (with the same bank she'd had her original mortgage with). She says this new mortgage has been unpredictable and often expensive; she is currently paying over £300 more each month than she would have done under the one she has missed out on. Miss H says this must be Sainsbury's Bank's fault, because her credit score had previously been impeccable, and when the late payment markers were finally removed, her score had returned to what it had been originally.

Meanwhile, after Sainsbury's Bank had removed the late payment markers in October, they were reported again, and they had to be removed again in November. Sainsbury's Bank offered Miss H £500 compensation for these errors, but she did not accept that. She said that the bank should reimburse her for the increased cost of her mortgage, which is substantial. She referred this complaint to our service.

Our investigator upheld this complaint. She accepted that Miss H's mortgage application had been affected because of Sainsbury's Bank's errors, and said that it should pay Miss H the difference between the interest rates for one year. She also said the bank should pay Miss H compensation of £750 (instead of £500).

Neither party agreed with that recommendation. Miss H said that she should be compensated for the difference in mortgage rates over five years, because she had been applying for a five year fixed mortgage. She said that only compensating her for one year would only have been fair if she would afterwards be able to obtain the same mortgage rate she had missed out on (3.8%) over the following four years. But that was not likely to be possible for at least two years, as current rates are much higher. So the investigator's proposal only covered 20% of her loss. She argued that instead, she should be paid the difference between 3.8% and what she had paid in the first year, but for a five year period, which she estimated would be about £20,600. (She later adjusted her position in response to one of Sainsbury's Bank's arguments.)

Sainsbury's Bank accepted that it had made mistakes and that in principle it should pay compensation to Miss H, but it disagreed about how much. It said that there was not enough evidence to show that its error was the sole or main reason why Miss H's mortgage application had been declined. It also said that it had corrected Miss H's credit file with all the agencies in November 2022, and so after that Miss H could have mitigated her loss by applying for a new mortgage with a better rate (there would have been no early repayment charge for leaving her variable rate mortgage). It was not reasonable to calculate her loss based on the five year term of the mortgage she had missed out on, or even based on one year; six months would be fairer.

The investigator thought it was unlikely that Miss H would be able to get a significantly better mortgage deal in the foreseeable future. Because agreement couldn't be reached, the investigator referred this case for an ombudsman's decision.

I wrote a provisional decision which read as follows.

What I've provisionally decided – and why

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

It is not in dispute that Sainsbury's Bank erroneously allowed negative information to be reported to Miss H's credit file. So I only need to decide whether it has paid or offered to pay her enough compensation for that issue. That question turns on whether the bank's error affected her mortgage application or not, since if it didn't, then I think that £500 would be fair.

I don't think Sainsbury's Bank is really disputing that having six late payment markers on Miss H's credit file would have made it harder for her to apply for credit. Rather, it wants to make sure that there is enough evidence to show that Miss H's mortgage application was declined solely or mainly because of that, and not because of a poor credit history reported on one or more other accounts by other lenders at the time the application was made. And it also wants to make sure that the rate of 3.8% in the mortgage illustration would have actually been granted to her if her application had been successful.

I will deal with that last point first: on the balance of probabilities, I think it is more likely than not that if Miss H's application had been approved, then she would have got the interest rate shown in the mortgage illustration. Our investigator asked the building society to confirm what the interest rate had been for the relevant product in September 2022, and the building society said that it could provide no further information beyond what the mortgage illustration said. So I think that is the best evidence that is available about what the rate would have been, and I think it is reasonable to accept it.

Turning to why the application was declined, Sainsbury's Bank has raised the following points. Firstly, although there is evidence that the application was declined as a result of credit checks, that evidence does not elaborate much further, so there is nothing to show that the application was declined because of what was being reported on Miss H's account with Sainsbury's Bank. It could have been something that was being reported by another lender, for example. We don't have a copy of Miss H's credit file from the date of the application, which could have ruled that out.

Secondly, Miss H was not making her application alone; it was a joint application with someone else, who I will call Mr W. Again, although he has provided a copy of his own credit file, it is a recent copy, so it doesn't show what was being reported at the relevant time. So the application could have been declined as a result of something on his own credit file in September 2022. I will deal with each of these points in turn.

Firstly, an email from the building society (which has been shared with Sainsbury's Bank) says:

> *"as per the screen shot below the reason for the decline was adverse credit which triggered a policy decline rule – this was [a] system decision … but looks like the worst status was 6 months arrears."*

Sainsbury's Bank has pointed out that this email doesn't say who that status was with. That is true, but since Miss H's account with Sainsbury's Bank was being reported as having six missed payments, it would be a bit of a coincidence if there was also another account with exactly the same feature on either her or Mr W's credit file; but if there was, then Sainsbury's Bank would still be 50% responsible. On balance, though, I think it is more probable that this is a reference to the markers which Sainsbury's Bank was erroneously reporting at the time, and which were removed in October 2022 and again in November.

Next, although the credit reports were provided in 2023, after Sainsbury's Bank had finally succeeded in removing the late payment markers, they show that Miss H and Mr W both had excellent credit histories. So while it is not impossible that either or both of them also had other negative data on their credit files in September 2022, it doesn't seem likely to me.

So I am satisfied on all the evidence I've seen that it is more likely than not that Sainsbury's Bank was indeed responsible for Miss H having her mortgage application declined in September 2022, and for her missing out on having a fixed rate of 3.8% for five years.

I now need to decide what would be fair compensation for that.

Sainsbury's Bank has argued that Miss H has failed to mitigate her loss – that is, to take steps to reduce the extra expenditure she has incurred by missing out on the 3.8% rate. When her original fixed rate ended in January 2023, she obtained a new mortgage with the same lender, on a variable rate (because the rate on the fixed rate product had increased to 5.14%). As there is no early repayment charge for leaving that mortgage for a better one, Sainsbury's Bank says that Miss H could and should have obtained a better fixed rate mortgage by now.

Miss H accepts that point, and has accordingly adjusted her stance to say that she should be paid (1) the difference between what she would have paid at 3.8% and what she paid under the variable rate during the first year of her new mortgage, (2) the difference between 3.8% and the best available fixed rate now, for the next four years, and (3) any associated re-mortgaging costs.

I agree that Miss H had a duty to mitigate her loss. That would usually mean taking the next best available fixed rate. But as mortgage rates all went up very quickly and by a considerable amount in late 2022, and continued to be high for much of 2023, I think it was reasonable of Miss H to not rush into getting a fixed rate again immediately, but to wait and see how rates might move. I am reinforced in that view by the fact that when her original fixed rate ended, she found that getting a variable rate mortgage with her original mortgage provider was more affordable than the best available fixed rate then being offered by the building society.

At time of writing, rates are beginning to come down again, so it may be time for Miss H to try and get a fixed rate again. But it may still be some time before 3.8% is available again.

So for the reasons given above, I think it would be reasonable to require Sainsbury's Bank to put things right by restoring Miss H's financial position to as close as reasonably possible to what it would have been if she had obtained the 3.8% fixed rate, five-year mortgage in early September 2022. And I think that her proposed solution is fair.

Subject to any further representations I receive from the parties by the deadline at the end of this decision, I am minded to require Sainsbury's Bank to pay Miss H:

- The difference between what she paid under her current variable rate mortgage during its first twelve months – that is, the period ending on 31 January 2024 – and what she would have paid at a fixed rate of 3.8% (she will need to provide evidence of the amounts of all the payments);
- The difference between 3.8% and the best fixed rate mortgage Miss H could reasonably be expected to get now (I invite evidence from both parties about what would be a reasonable rate for this purpose), over the following four years; and
- £750 for Miss H's trouble, instead of the £500 Sainsbury's Bank has offered to pay (in addition to the money it paid her in 2021).

Responses to my provisional decision

Sainsbury's Bank did not accept my provisional decision. It maintained that Miss H had failed to mitigate her loss. It provided evidence from a third party website that if the loan to value (LTV) of Miss H's home was 60%, then she could have obtained a fixed rate of 3.99% in February 2023, or 3.83% in April 2023. It therefore argued that it should not have to pay anything for the period following January 2024.

(The bank also argued that Miss H could have applied for a new rate as early as November 2022, although it conceded that she could not have obtained such favourable rates back then. I think it would have been reasonable of her to wait a bit longer to see what happened.)

I shared those objections with Miss H (except the one in the previous paragraph). She replied to say that the best fixed rate her current provider could offer her now was 4.46% (with a fee of £999), and that she would prefer not to apply to a different provider because of the time this would take and the stress of having to go through the associated checks. Alternatively, Sainsbury's Bank should compensate both her and Mr W for the time it would take them to apply to another provider, at their hourly salaried rates.

Miss H also argued that it was unfair to assume that she could have obtained the best available rate on the market; she said that average rates across the whole market were more probative. She provided a table of average five-year fixed rates for 60% LTV mortgages published by the Bank of England, showing average rates of 4.34% in February 2023, 4.11% in April 2023, and 4.32% in January 2024. But even the lowest possible rate found by Sainsbury's Bank was still 0.3% higher than the rate she had missed out on in 2022.

Miss H added that the bank had never advised her that she should mitigate her loss. She also said that it is easy to see how she could have mitigated her loss with the benefit of hindsight, but it would have been much harder for her to decide what she should do while she was in the middle of it all. She maintained that she should be compensated for the full five years of loss that she has incurred or will incur.

My findings

The legal position is that people are generally expected to pro-actively try to take steps to mitigate their loss, whether or not the other party to the subsequent litigation (or anyone else) tells them to do so. I think it would be reasonable for me to apply that same principle in this case, and indeed that is the usual approach of this service. So although Sainsbury's Bank didn't tell Miss H what to do, I still think it is fair to take into account what she could have done to improve her position in 2023.

Although I appreciate that applying to a different lender for a new mortgage is less convenient than applying to her current lender, I don't think that is an unreasonable thing to expect Miss H to do. If it means she can get a better rate, then it will be worth it (and she was applying to a different provider in 2022 – otherwise she would not have been offered the 3.8% rate). I'm afraid I wouldn't expect Sainsbury's Bank to compensate her for the additional time it will take her to do that (and I cannot award compensation to Mr W, because he is not a party to this complaint).

I do think that Miss H has made a fair point about the benefit of hindsight. There is no guarantee that she would have found the 3.83% fixed rate if she had looked for a new fixed rate mortgage in April 2023, nor is there any guarantee that she would have been approved for it if she had applied for it. So I gave serious thought to basing the compensation on the average rate instead. But I have decided not to do that, because the reason we don't know what would have happened is because Miss H stayed on the variable rate for a year, instead of seeing what she could get. Perhaps she really could have got the 3.83% rate. So for the purposes of calculating her loss over the next four years, I will use that rate, and direct the bank to pay her the difference between that and the rate she missed out on.

I recognise that that remedy is not logically consistent with also refunding Miss H the difference between 3.8% and the variable rate she was on in 2023 for twelve months, given that the 3.83% rate was available in April 2023. So I considered reducing that period to four months; but I have decided to stick with what I originally said as a way of taking into account Miss H's point about it being easy to see what rate she could have got in hindsight, but harder for her to know at the time. (For example, in April 2023, when rates were coming down, it might have made sense to wait a bit longer to see if they kept coming down, but then they went up again.)

My final decision

So my decision is that I uphold this complaint. I order Sainsbury's Bank Plc to pay Miss H:

- The total amount of the difference in monthly payments between what she paid under her current variable rate mortgage during its first twelve months – that is, the period ending on 31 January 2024 – and what she would have paid at a fixed rate of 3.8% (she will need to provide the bank with evidence of the amounts of all the payments she has made);

- The total amount of the difference in monthly payments between the rates of 3.8% and 3.83% (*i.e.* 0.03%) over the following four years, in one lump sum; and

- £750 for Miss H's trouble, instead of the £500 Sainsbury's Bank had offered to pay (in addition to the money it paid her in 2021).

Under the rules of the Financial Ombudsman Service, I’m required to ask Miss H to accept or reject my decision before 19 March 2024.

Richard Wood
Ombudsman