DRN-4633490

The complaint

Mrs P complains that Marks & Spencer Financial Services Plc (MSFS) irresponsibly gave her a credit card that she said she couldn't afford.

What happened

In November 2019 Mrs P applied for a credit card account with MSFS. Her application was accepted and MSFS issued Mrs P with credit card with a limit of £4,000. Mrs P said she struggled to make the minimum repayments needed. Mrs P complained to MSFS as she said she was on a low income, had dependent children and was in arrears with her mortgage and utilities at the time MSFS lent to her. She said they hadn't sufficiently checked the lending was affordable.

MSFS said Mrs P had declared she worked full time and had an annual salary of £55,000.They said they'd carried out an affordability check, and credit worthiness check. And this had confirmed to them that there wasn't any adverse Information showing on Mrs P's credit file. MSFS said from the information they'd gathered they determined the lending was affordable for Mrs P.

Mrs P wasn't happy with MSFS' response and referred her complaint to us.

Our investigator said he couldn't say the checks MSFS had done were proportionate and reasonable based on the evidence MSFS had provided. He assessed Mrs P income and expenditure at the time of the lending and said this showed the lending was unaffordable for her. He said Mrs P shouldn't pay more than the cash price of any credit she'd used, so he asked MSFS to

- Remove all interest and charges.
- To work out how much Mrs P would have owed after the above adjustments. Any repayment Mrs P made since 5 November 2019 should be used to reduce the adjusted balance.
- If this clears the adjusted balance any funds remaining should be refunded to Mrs P along with 8% simple interest* - calculated from the date of overpayment to the date of settlement.
- If after all adjustments have been made Mrs P no longer owes any money then all adverse information regarding this account should be removed from the credit file.
- Or, if an outstanding balance remains, they should look to arrange an affordable payment plan with Mrs P for the outstanding amount. Once Mrs P has cleared the balance, any adverse information should be removed from the credit file.

MSFS didn't agree. They said they'd shown they'd carried out proportionate and reasonable checks in line with the relevant guidance. And asked for an ombudsman to decide.

What I've 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.

Having done so I uphold this complaint. I'll explain why.

I've considered the relevant rules, guidance and good industry practice when someone complains about irresponsible and/or unaffordable lending. There are two overarching questions I need to consider to decide what's fair and reasonable in all of the circumstances of the complaint. These are:

1.Did MSFS complete reasonable and proportionate checks to satisfy themselves that Mrs P would be able to repay the credit in a sustainable way?

a. if so, did MSFS make a fair lending decision?

b. if not, would reasonable and proportionate checks have shown that Mrs P could sustainably repay the borrowing?

2. Did MSFS act unfairly or unreasonably in some other way?

Regulations in place at the time MSFS lent to Mrs P required them to carry out a reasonable assessment of whether she could afford to repay the credit in a sustainable manner. This is sometimes referred to as an "affordability assessment" or "affordability check".

The affordability checks should be "borrower-focused", meaning MSFS need to think about whether repaying the credit sustainably would cause difficulties or adverse consequences for Mrs P. In other words, it wasn't enough for MSFS to think only about the likelihood that they would get their money back without considering the impact of repayment on Mrs P herself.

MSFS is free to decide how to set their lending criteria but they should complete proportionate checks to ensure borrowing is sustainable. There's no set list for what reasonable and proportionate checks are. What constitutes a proportionate affordability check will generally depend on several factors such as the specific circumstances of the borrower, their financial history, current situation and whether there are any indications of vulnerability or financial difficulty. Consideration should also be given to the amount, type and cost of credit being applied for.

Section 5.2A of the Financial Conduct Authority's (FCA) Consumer Credit Sourcebook (CONC) provides examples of the factors that need to be considered and the circumstances, under which, they should be applied. And MSFS say their checks satisfy this guidance. They said this showed Mrs P was low risk as there wasn't any adverse information showing on her credit file, her level of indebtedness was low, and she was within their credit policy thresholds.

But MSFS has only provided a summary of what they say they found from these checks. They said Mrs P had an income of £3,169, and outgoings, including her mortgage commitment of £1,451 which meant she'd a disposable income of £1,719. They also said she had unsecured debt of £28,000. As MSFS has only provided a summary of what they saw I can't be sure exactly what MSFS found out at the time of granting credit to Mrs P.

So, in the absence of anything from MSFS, I've relied on the evidence Mrs P has been able to provide. I'm not suggesting that MSFS needed to obtain any of the specific documents Mrs P has now provided, but I think these give a good indication of at least what basic information MSFS likely found out (or ought to have found out) about her income and existing credit commitments.

The information and evidence Mrs P provided shows that at the time of applying for the credit card she was making monthly repayments to several debt collection companies. She has also said she was in arrears with her mortgage, and I can see that she was paying around £726 a month in mortgage repayments, which is more than the amount used by MSFS in their assessment. And I think it likely that Mrs P's current and previous financial difficulties would have been visible in any credit check MSFS might have completed. So, from what I've seen I think MSFS ought to have been prompted to make a more thorough enquiry of Mrs P's financial circumstances before they agreed to lend. I say this as it would have, on balance, given MSFS a clearer understanding of Mrs P's financial position. The reliance on credit reference data I don't think was enough here.

Our investigator has obtained Mrs P's bank statements, and I've looked at the three months prior to the lending. I can see that Mrs P's actual income which included salary and benefits averaged £2,194 a month, around £1,000 less than the income used by MSFS in their assessment. As stated above her monthly mortgage repayment was £726, and in total she was paying £43 to debt collectors. Once non-discretionary spend was factored in for food, utilities, insurance, travel costs and other credit commitments, including an average monthly payment of £280 to another credit card. This left Mrs P without any disposable income to be able to meet her new lending commitment.

I can see that there was a promotional offer of 0% interest for six months on purchases and 0% interest for 28 months for balance transfers when Mrs P applied for her MSFS credit card. But Mrs P didn't use the balance transfer offer. And I can see that within a couple of months of having the credit card Mrs P was close to her credit limit and by February 2020 was over her limit and had a late payment charge. Which I think shows that Mrs P couldn't sustain her existing financial commitments and the increased indebtedness worsened her financial situation further.

I think if MSFS had checked further into Mrs P's actual financial situation as I think they ought to have here, I don't see how they could have concluded anything other than the new credit would be unaffordable and unsustainable. So, I think MSFS acted unfairly in opening the account.

Putting things right

Where credit has been provided when it shouldn't have been, I think it's fair and reasonable for Mrs P to pay back the funds she's lent – when she used her credit card. But not the interest or any other charges that MSFS has applied. I'd also expect MSFS to remove any adverse information they've reported to the credit reference agencies about this account.

My final decision

I uphold this complaint. And ask Marks & Spencer Financial Services Plc to:

- Re-work the credit card removing all interest, fees, and charges.
- If the re-work results in a credit balance this should be refunded to Mrs P alongside *8% simple interest per year, calculated from the date the account would have first gone into a credit balance to the date of settlement.
- Remove any adverse information they might have recorded on Mrs P's credit file in relation to this account.

Or;

- If the re-work results in there still being an outstanding capital balance, They should arrange a suitable and affordable repayment plan with Mrs P for the remaining amount. Once the capital has been repaid they should then remove any adverse information they might have recorded on Mrs P's credit file in relation to this account.

*If Marks & Spencer Financial Services Plc considers tax should be deducted from the interest element of my award, they should provide Mrs P with a certificate showing how much tax they have taken off so that she can reclaim that amount, if she is eligible to do so.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs P to accept or reject my decision before 29 March 2024.

Anne Scarr
Ombudsman