

complaint

Mr A and Ms B complain that HSBC Bank Plc wrongly refused their mortgage application on grounds of age.

background

Mr A and Ms B approached HSBC with a view to taking out a mortgage on their property on an interest only basis for 18 years. After issuing a decision in principle (DIP) which indicated that the Bank would be prepared to lend Mr A and Ms B around £250,000, HSBC refused to consider their application because Mr A would be over 65 years old at the end of the proposed term. HSBC said it has a policy not to allow interest only mortgages to applicants who would be over 65 at the end of the term. It indicated it would consider the application if Ms B made it in her sole name, or if the term requested was reduced by ten years, or if it was on a capital repayment basis (for which the maximum age is 75).

Mr A and Ms B complained that the refusal to consider their application purely on the basis of Mr A's age was discriminatory. They said that their personal circumstances meant that there was no additional risk to the Bank or to them in lending to them jointly rather than to Ms B alone. They argued that to reject their application on this basis was against the Equality Act 2010 and the Equality Act 2010 (Age Exceptions) Order 2012 because the Bank was carrying out a risk assessment without reference to relevant information from a source on which it is reasonable to rely.

HSBC rejected Mr A and Ms B's complaint. It said it was entitled to apply a maximum age policy because of the exception in the legislation for financial services and that the reason for refusal was a policy on age and not a risk assessment.

Mr A and Ms B brought their complaint to this service and I issued a provisional decision upholding their complaint. I explained that I was minded to uphold the complaint for the following reasons:

- In deciding what was fair and reasonable in all the circumstances, I had taken into account (among other things) the relevant law, including the Equality Act 2010;
- I thought that the policy was based on an assessment of risk relating to a person's ability to repay a loan and HSBC hadn't shown that it carried out that risk assessment '*by reference to information which is relevant to the assessment of risk and from a source on which it is reasonable to rely*' (in accordance with the law).
- I wasn't persuaded that HSBC's decision to apply the policy in the individual circumstances of Mr A and Ms B was fair and reasonable. This was because the application of the policy in this case didn't protect Mr A and Ms B from unaffordable lending as the Bank was prepared to consider lending the amount requested to Ms B alone; and Mr A didn't plan to retire at 65 and, in any event, his work pension alone was likely to provide enough income to cover the payments.

As a result of those provisional findings, I proposed that HSBC should:

- reconsider Mr A and Ms B's interest only mortgage application with the end date originally requested without applying the maximum age policy; and

- pay Mr A and Ms B £500 for the distress and inconvenience caused by HSBC's actions.

In its response to my provisional decision, HSBC clarified that, on further investigation, it had in fact based its age policy on an assessment of risk. It tried to explain that the policy was adopted by reference to information that was relevant to the assessment of risk and from a source on which it was reasonable to rely.

HSBC indicated that it would reconsider Mr A and Ms B's application without reference to its age criteria but applying all its other lending criteria. There have been significant changes in lending criteria since Mr A and Ms B originally approached HSBC. So I asked HSBC to process the application before I issued a final decision so that I could properly assess the impact the age policy had on Mr A and Ms B.

Because of the significant shift in HSBC's arguments and the changes to its lending criteria and the regulatory framework which impacted on the ability to process Mr A and Ms B's mortgage application, I decided to issue a further provisional decision to clarify my position regarding the age policy and to review the proposed redress but my overall conclusions remained unchanged. Mr A and Ms B did make further submissions following that provisional decision but HSBC confirmed that it was agreeable to my proposed settlement.

my findings

I have included only a brief summary of the complaint, but I have read and considered all the evidence and arguments available to me from the outset, including the additional submissions from Mr A and Ms B in order to decide what is fair and reasonable in all the circumstances of this complaint.

When considering what is fair and reasonable, I am required to take into account relevant law and regulations, regulator's rules, guidance and standards as well as codes of practice and, where appropriate, what I consider to have been good industry practice at the time.

I have taken into account the Financial Services Authority (FSA) principles, in particular Principle 6 which says that *'a firm must pay due regard to the interests of its customers and treat them fairly.'* As well as the FSA Mortgages and Home Finance: Conduct of Business sourcebook (MCOB) rules.

I have also borne in mind the general legal position including the law relating to age discrimination. Although most provisions of the Equality Act 2010 came into effect in 2010, the ban on age discrimination did not come into force until 1 October 2012. The actual event being complained about in this case is Mr A and Ms B's mortgage appointment with HSBC, which took place shortly after 1 October 2012, in which HSBC told them that they could not apply for a mortgage (because of the maximum age policy).

At that time, HSBC – as a service provider – was prohibited from treating Mr A and Ms B less favourably than they treat or would treat others because of age. Section 29 of the Equality Act 2010 provides that:

'(1) A person (a "service-provider") concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.'

(2) A service-provider (A) must not, in providing the service, discriminate against a person (B)— .

- (a) as to the terms on which A provides the service to B;*
- (b) by terminating the provision of the service to B;*
- (c) by subjecting B to any other detriment.*

However, a specific exception for providers of financial services was provided at Paragraph 20A of Schedule 3 of the Equality Act 2010, as follows:

'20A.— Age

- (1) A person (A) does not contravene section 29, so far as relating to age discrimination, by doing anything in connection with the provision of a financial service.*
- (2) Where A conducts an assessment of risk for the purposes of providing the financial service to another person (B), A may rely on sub-paragraph (1) only if the assessment of risk, so far as it involves a consideration of B's age, is carried out by reference to information which is relevant to the assessment of risk and from a source on which it is reasonable to rely.'*

I note that, even if the financial services exception didn't apply, according to Section 13(2) of the Equality Act 2010, different treatment based on age may be lawful if it is a proportionate means of achieving a legitimate aim.

In this case, there is no dispute that HSBC treated Mr A and Ms B differently on the basis of age. That is because Mr A's age was the only factor that prevented HSBC from considering their mortgage application.

Therefore, taking the relevant considerations into account, it seems to me that the main question I need to consider is whether HSBC treated Mr A and Ms B unfairly by refusing to consider their mortgage application. When considering this, I have taken the relevant law into account and I believe that the principal questions I need to ask are:

1. whether HSBC undertook a risk assessment for the purposes of considering Mr A and Ms B's mortgage application; if so
2. whether HSBC carried out that exercise by reference to relevant information from a source on which it was reasonable to rely; and
3. whether HSBC's actions were a proportionate means of achieving a legitimate aim.

On the issue of fair compensation, I am mindful of the law relating to causation and remoteness. If, having considered all the relevant circumstances, I find that HSBC treated Mr A and Ms B unfairly by refusing to consider their mortgage application, I then need to consider:

- what would have happened if HSBC hadn't acted in the way it did; and
- whether it would be fair to award compensation, and, if so, how that should be calculated in the circumstances of this case.

1. did HSBC undertake a risk assessment?

I consider that HSBC's maximum age policy is based on an assessment of risk because it stems from a consideration of the risk that circumstances would affect a person's ability to repay the loan. I note that HSBC has changed its position a number of times on this issue but it has now accepted that the age policy it applied for the purposes of considering Mr A and Ms B's mortgage application was based on a risk assessment. I am satisfied,

therefore, that HSBC did undertake a risk assessment based on age for the purposes of considering Mr A and Ms B's eligibility to apply for their mortgage.

2. did HSBC carry out its risk assessment by reference to relevant information from a source on which it was reasonable to rely?

HSBC has said that the age policy was established in late 2010 in order 'to mitigate any reputational risk of allowing customers to borrow into retirement'. It went on to point out that reputational risk is:

'...something which cannot be tangibly measured or objectively determined. There is no source of internal or external data by which such risk can be assessed. However, the good reputation of the Bank and, indeed, of any provider of financial services, is an extremely valuable asset. It is therefore reasonable to rely on the experienced managers within the Bank when assessing whether or not a particular policy or course of action could expose the Bank to reputational risk.'

It had no minutes of the reputational risks that the committee who adopted the age policy in 2010 would have considered but it suggested that they would have been (as it says they are now):

- *the Bank's credibility to its regulator, the market, its customers and the public as a responsible lender in agreeing interest only mortgage loans the term of which would extend into a period following retirement when many customers would experience a reduction in income. There would be a risk that the customers could not afford the contractual monthly payments for these variable rate loans or to repay the capital balance due at the end of the term. Accordingly, financial hardship or default could result.*
- *the Bank's perception in the eyes of the media, the courts, its customers and the public if it were obliged to enforce any mortgage loan following default where the customer was retired or elderly. The risk of damage to reputation would increase according to the age of the customer.*

Although it had no contemporaneous record of the information considered by the committee, it put forward a number of examples of the types of information the committee would have considered which it says were available for the industry as a whole. These included:

- *'lending into retirement increases the possibility that the loan will be repaid from the sale of the security...Accordingly pricing such a product is more difficult as the margin becomes dependent on actuarial risk rather than credit risk'.*
- *a large number of the Bank's competitors had introduced maximum age criteria, if the Bank hadn't introduced the age policy, this could have 'encouraged an increase in applications for lending to older customers where the possibility of the death of a sole borrower or one party was significantly increased.'*
- *the Financial Services Authority (FSA) had recently expressed concerns about interest only mortgages and the number of borrowers reaching the end of their terms without a repayment vehicle in place.*

- the FSA had raised concerns about lending into retirement.
- the rate of arrears for interest only mortgages increases with the age of the customer (as evidenced by figures that wouldn't have been available in 2010).
- in its view *'the state pension was not regarded as adequate at the time'*.

I considered these points carefully but I find that the risk assessment carried out by HSBC through its maximum age policy applied to Mr A and Ms B's application wasn't based on information that was relevant to the risk relating to Mr A and Ms B as joint applicants falling into different age brackets.

HSBC was concerned that lending on an interest only basis to people who reach the age of 65 before the end of the term would risk financial hardship or default with the consequent risk of damage to its reputation. I'm not persuaded that these general concerns were likely to be relevant to Mr A and Ms B's joint application.

On the face of things, their joint income would appear to have been sufficient to meet the monthly payments they were looking to apply for after Mr A reached 65. It seems that Ms B's income alone would have been sufficient for the Bank to consider a mortgage application in 2012. The loan to value of the mortgage requested was relatively low. Mr A's professional circumstances meant that it was unlikely he would have to retire at 65 and he says he would have continued to work for some or all of the proposed term. His work pension was based on his final salary and he says he has other pension pots at home and abroad as well as relevant insurance.

Rather than considering Mr A and Ms B's individual circumstances, it seems that the information the Bank relied on included untested assumptions, stereotypes or generalisations in respect of age and wasn't relevant to Mr A and Ms B's circumstances. In my view, the information that HSBC relied on led it to the arbitrary conclusion that it couldn't lend to Mr A and Ms B. As a result, HSBC's risk assessment in their case was flawed.

I find, therefore, that HSBC's risk assessment was inadequate in that it wasn't carried out by reference to relevant information for joint borrowers and was based on information that included untested assumptions, stereotypes or generalisations in respect of age.

3. *did HSBC treat Mr A and Ms B unfairly by refusing to consider their mortgage application on the basis of Mr A's age?*

HSBC put forward the argument that its age policy is designed to mitigate the risk of financial hardship or default amongst older consumers. In my view, this could be considered a legitimate aim. But in this case Mr A and Ms B were making a joint application and Ms B wasn't affected by these considerations. HSBC was still prepared to consider lending the amount requested for a longer term on a capital and repayment basis (which generally involves higher payments). In 2012 it seems that HSBC would have been prepared to offer the amount requested to Ms B alone. It is therefore unclear why the lending wouldn't have been acceptable if Mr A was added to the mortgage. I find it difficult to understand how HSBC's approach could be considered as proportionate to its aim.

Having taken all these factors into consideration, I find that HSBC didn't treat Mr A and Ms B fairly and reasonably when it refused to consider their mortgage application on the basis of Mr A's age alone.

4. *fair compensation*

It's not clear what would have happened if Mr A and Ms B's application had been considered in October 2012 without the age policy. While Mr A and Ms B were given a decision in principle which indicated that HSBC could lend just under £250,000 to them, that doesn't mean that their application would necessarily have been successful. HSBC might, for example, have declined to lend to them if they didn't have an acceptable repayment vehicle in place for their interest only mortgage. It is, however, possible that their application might have been successful and that they would have paid less interest than they have been paying on their existing mortgage.

In my first provisional decision, I indicated that HSBC should reconsider Mr A and Ms B's interest only mortgage application with the end date originally requested without applying the policy on maximum age. HSBC stressed that any consideration of an application by Mr A and Ms B would be in accordance with all other relevant current lending criteria and affordability requirements to ensure that it met its regulatory requirements. I therefore requested that an application should be processed before reaching a final decision so that I could assess whether or not the consideration of Mr A and Ms B's application would be affected by changes to the lending criteria since 2012.

That application was unsuccessful. It seems that the result may have been affected by significant changes to affordability requirements and criteria relating to repayment vehicles since 2012. HSBC has argued that the criteria have changed in response to new regulatory requirements around responsible lending. In the circumstances, it appears that Mr A and Ms B weren't able to put forward a repayment vehicle that would be acceptable to HSBC and therefore I can see that an application for an interest only mortgage on any term is unlikely to succeed now irrelevant of the age issue which is at the heart of this complaint. I therefore no longer think that a reconsideration of their application would be appropriate redress in this complaint.

I note that Mr A and Ms B have raised new concerns about HSBC's lending criteria regarding repayment vehicles but, in my view, this is a separate issue and shouldn't be considered as part of this complaint. Mr A and Ms B should address those concerns directly to HSBC in the first instance.

It is possible that if HSBC hadn't applied its age criteria, Mr A and Ms B might have successfully taken out a mortgage with it in 2012 even though the recent application with the 2014 lending criteria was unsuccessful.

I note that Mr A and Ms B did suggest to HSBC that they could process the application on a reduced term pending the outcome of the complaint and they say that HSBC rejected this suggestion. But in its letter of 12 March 2013 HSBC did offer to reconsider Mr A and Ms B's application on a shorter term basis although it wouldn't be prepared to waive fees and didn't commit to waiving fees for any possible future extension if their complaint was successful. I can't see that Mr A and Ms B followed up this offer. If they had, I believe that their application could have been considered more or less on the basis of the same criteria as those applicable in 2012 with the possibility of altering the term and addressing the issue of fees depending on the outcome of the complaint.

Taking this into account along with the possibility that the application in 2012 might not have succeeded and the fact that Mr A and Ms B's application doesn't meet HSBC's lending criteria now, I'm not persuaded that it would be fair to put Mr A and Ms B into the position they would have been in if their application had been successful in 2012.

In my provisional decisions, I indicated that I felt that £500 was an appropriate level of compensation to Mr A and Ms B for the hurt caused to them by HSBC's unfair application of its age policy.

In response, they argued that the amount should be increased so that HSBC would take the matter more seriously in the future. They also compared their situation to other types of possible discrimination and argued that the discrimination had been on-going for two years. Having given the matter careful consideration in the context of the kind of awards that we make, I am still satisfied that £500 is appropriate in this case.

Our awards for distress and inconvenience are designed to compensate consumers to some degree for the harm they have suffered, they shouldn't be considered as punitive. They don't necessarily reflect what a court might award in terms of damages. It is clear that, Mr A and Ms B felt aggrieved about the unfairness of the application of the age policy and the way it might impact on their future financial choices. But I don't think it's right to consider the time it has taken to resolve what is a complex complaint as evidence of on-going unfairness. The level I have suggested is, in my view, appropriate in these circumstances. If HSBC had not offered to consider an application on a shorter term by Mr A and Ms B in early 2013, I may have been minded to increase the award to reflect the on-going impact on them but I am satisfied that an application could have been made at that stage which wouldn't have disadvantaged them. The issues that they have raised in relation to the recent application and HSBC's lending criteria relating to repayment vehicles are, in my view, a separate issue.

my final decision

It is my final decision that this complaint is upheld.

HSBC Bank Plc should pay Mr A and Ms B £500 for the distress caused to them by its unfair treatment because of Mr A's age.

Susie Alegre
ombudsman