

The complaint

Mr S complains that NewDay Ltd trading as Aqua has unfairly recorded a marker at CIFAS, the national fraud database.

What happened

Mr S sent NewDay a cheque for £3,100 dated 25 June 2019 to pay to his credit card account. That cheque was returned unpaid. But before that Mr S had been able to make payments against that cheque on 5 and 6 July 2019 using his credit card.

NewDay says that Mr S reasonably knew that the cheque wasn't going to be paid and that he had misused his facility. His account balance was taken over the limit when the cheque was returned. It applied the marker as a result.

Our investigator didn't recommend that the complaint be upheld. Mr S had told him that he expected a friend to have paid money into his bank account and this didn't happen. In addition, direct debits had been taken out. He didn't check his bank account. And as NewDay let him take out money Mr S didn't consider this to be fraud.

Our investigator said that NewDay had evidence that there were insufficient funds in his bank account held with a different financial business to pay this cheque. Mr S hadn't provided any evidence to show that there should have been money to pay it. It was his responsibility to make sure the cheque cleared. It was often possible as here to spend against a cheque before it had cleared. He was satisfied that NewDay had carried out sufficient information to meet the high bar for recording a CIFAS marker.

Mr S didn't agree and wanted an ombudsman to review his complaint. He pointed out the time that had passed before the payments he made from his account with this money. He believed the cheque had cleared. And he didn't think that this was fraud – it was his cheque that had not been paid. He hadn't taken anyone else's money and had been taking advice about how to repay the money.

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.

I need to consider whether the report to CIFAS was made fairly. On this point, NewDay needs to have more than a suspicion or concern. It has to show it had reasonable grounds to believe that a fraud or financial crime had been committed or attempted and that the evidence would support this being reported to the authorities.

The cheque in question was for a significant amount and which would have nearly paid off the full balance on the credit card account that month. Mr S had already made a payment of £170 on 23 June 2019 which covered the minimum payment that had been requested on his last monthly statement. He clearly decided to make a further payment and which he says was to reduce the amount of interest he paid.

NewDay sets out on the back page of his statements that at least seven working days should be allowed from receipt of a cheque for it to clear and to allow for postage time. Here it received notification that the cheque hadn't been paid on 5 July 2019 and adjusted his account for this on 6 July 2019. Clearly there was a time when Mr S was able to make payments against these still uncleared effects.

It seems he did so as soon as this was possible making payments to a supermarket and for petrol on 5 July 2019 and also making a cash withdrawal for £300, and then for a further £300 on 6 July 2019. I think it notable that he attempted to make other payments including one for some £2,000 on 6 July 2019 too which was declined. That indicates to me that he was trying to benefit from the full amount of the cheque.

NewDay has evidence that there were never funds to pay the cheque when it was issued and clearly it was returned by the bank on which it was drawn. As our investigator says Mr S hasn't been able to show that he could reasonably expect this cheque to be paid. I consider that it's not as if this was a relatively small amount where by an oversight there might have been insufficient funds. This was a significant amount and most of which Mr S attempted to benefit from as soon as the money became available on his credit card account. I appreciate that NewDay let him make some withdrawals. But I don't think in the circumstances Mr S could think otherwise than that this was an opportunity to exploit the cheque clearing cycle and make payments that he wouldn't otherwise have been able to.

I know he says this was his money or debt and no other third party was involved with the cheque. I understand that. But the outcome was both an actual increase in debt above his credit limit which NewDay says it wouldn't otherwise have allowed. And that's why this is a misuse of his facility at NewDay for his own gain. I think his attempt to take more money than he was allowed to is additional evidence of his intent here.

So, I've looked at whether NewDay was fair to apply the marker, based on the evidence it had, and the investigation it carried out. CIFAS guidance says the business must have carried out checks of sufficient depth to meet the standard of proof set by CIFAS. This essentially means that NewDay needs to have enough information to make a formal report to the police. And that any filing should be for cases where there are reasonable grounds to believe fraud or financial crime has been committed, rather than mere suspicion.

Having reviewed the account of events by Mr S and the evidence NewDay has provided, I'm satisfied that NewDay had sufficient evidence for the CIFAS marker to be recorded. In coming to this view, I've taken into account the following reasons:

- Mr S paid a cheque into his account that he had no reasonable expectation would be paid.
- He made payments and attempted payments against this cheque.
- He reasonably knew that these payments ought not to have been made as they would take him over his credit card limit and wouldn't otherwise be allowed by NewDay as he wasn't entitled to this money.

I appreciate he will be disappointed by my decision.

My final decision

My decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 18 November 2020.

Michael Crewe
Ombudsman