

The complaint

Mr D complains that Tesco Personal Finance PLC loaded a marker against his name on the National Fraud Database. And he'd like this removed.

What happened

Mr D had a credit card with Tesco bank. Mr D had a direct debit set up to pay the full statement balance on his credit card on a monthly basis using his current account with a third party bank I'll call Bank U. Between March and July 2019 Mr D's direct debit was reversed on a number of occasions – and on a number of these occasions Mr D spent the available balance before the payment was reversed.

In July 2019 Tesco closed Mr D's credit card and loaded a CIFAS marker against him for 'misuse of facility'. When Mr D's account was closed he had balance of just over £4,800, which was £1,800 over his credit limit.

Mr D complained to Tesco that the marker had been loaded unfairly.

Tesco looked into Mr D's complaint but didn't uphold it. In summary they said the CIFAS marker had been loaded fairly, and they wouldn't be removing it.

Mr D wasn't happy with Tesco's response so complained to our service. He explained that the CIFAS marker is having a negative impact on him, leading to increased stress and he's been unable to open a bank account.

One of our investigator's looked into Mr D's complaint. He asked Mr D further questions about whether he knew he didn't have sufficient funds in his bank account with U to pay the direct debits. Mr D explained that at the time of the returned direct debits he'd been expecting large payments for building work he'd completed. He'd waited for the direct debits to go through and wasn't always aware that his direct debits were failing.

Our investigator concluded that the bank acted fairly in closing Mr D's account. However he thought Tesco didn't have sufficient evidence to meet the burden of proof required for CIFAS. In particular they thought Mr D may not have been aware of his actions, didn't realise what he was doing was wrong and Tesco don't have good reason to think they suffered a loss. So he asked Tesco to remove the CIFAS marker and pay Mr D £250 in compensation for the impact of the marker.

Mr D accepted our investigator's thoughts but Tesco's didn't. In response they said:

- At the time of the account closure the bank had suffered a loss as Mr D was £1,853 over his credit limit.
- Mr D repeatedly told the bank he had the available funds to clear the balance, however failed to do so.
- Mr D spent funds that weren't his.
- Mr D had a responsibility to check his available funds.

- Just because he honoured some of the direct debits doesn't mean he acted appropriately.

As Tesco's didn't accept our investigator's opinion the case was referred to me for to decide.

On reviewing Mr D's case I came to a different conclusion to our investigator. And I wrote to both parties on the 13 February 2021 with my Provisional Decision asking them to respond with comments by the 1 March 2021.

Tesco's accepted my Provisional Decision.

Mr D didn't accept – and in summary said:

- He hadn't realised he'd reached his credit limit.
- He was very busy at work.
- He didn't have online banking at the time of the transactions.
- He was reliant on his clients paying him money.
- Why didn't Tesco block his card and continued to allow him to spend over his limit?
- He didn't act fraudulently.

As Mr D didn't accept my Provisional Decision I've reviewed my initial conclusions.

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 reviewed the evidence, I won't be changing the conclusions I reached in my Provisional Decision. And I'll explain why below.

In my Provisional Decision I said:

Mr D accepted our investigator's view that Tesco's were entitled to close his credit card. And I'm in agreement with our investigator here. I won't go into much detail – because of both parties accepting this part of the view – however I'd like to briefly explain why I think Tesco have acted fairly. Looking at the terms and conditions of Mr D's credit card, Tesco's were entitled to close Mr D's account at any time by giving at least two months' notice. However, the terms and conditions also allow, in certain circumstances, for the bank to end the agreement immediately. I've looked at these particular reasons, and I'm satisfied that Tesco were entitled to apply them in Mr D's case.

I've moved on to consider the loading of the CIFAS marker.

The marker that Tesco have filed with CIFAS is intended to record that there's been a 'misuse of facility' – relating to using the account for uncleared effects fraud. What this means in practice is using funds which don't belong to the customer. In order to file such a marker, the bank isn't required to prove beyond reasonable doubt that Mr D is guilty of fraud or a financial crime, but they must show that there are grounds for more than mere suspicion or concern. CIFAS says:

- *“There must be reasonable grounds to believe that an identified fraud or financial crime has been committed or attempted; [and]*
- *The evidence must be clear, relevant and rigorous such that the member could confidently report the conduct of the subject to the police.”*

What this means in practice is that Tesco must be able to show that Mr D spent funds that weren't legitimately his. And secondly, Tesco will need to have strong evidence to show that the consumer was deliberately dishonest in doing so – in simple terms meaning that he knew the available funds on his Tesco credit card weren't his. A marker should not be registered against someone who was unwitting; there should be enough evidence to show deliberate complicity.

To meet the standard of proof required to register a CIFAS marker, the bank must carry out checks of sufficient depth and retain records of these checks. This should include giving the Mr D the opportunity to explain the activity on his account in order to understand their level of knowledge and intention.

I've considered whether Tesco have sufficient evidence to meet this standard of proof to load the marker against Mr D. And I'm satisfied they have. I'll explain why below:

- I've reviewed the credit card statements Tesco have sent to our service. I can see that on six separate occasions, when Mr D's direct debit was reversed, he spent on temporarily available funds. On all these occasions following the direct debit reversal Mr D's balance was over his credit limit.*
- On most of the occasions Mr D spent on the funds, prior to his spending his credit card was already above the agreed limit. Therefore he had no available funds to spend – and on all occasions his spending led to the credit card going further over the agreed limit. For example on the 15 March 2019 Mr D's credit card balance was £900 over his limit prior to the direct debit payment. On the same day, and before the direct debit was reversed, Mr D spent over £1,650 leaving him more than £2,500 over his agreed limit. I think this indicates Mr D's motivation was to gain access to the funds made available by the direct debit.*
- I've seen evidence of a number of different notifications sent to Mr D between March and June 2019 which informed him that his direct debits had been reversed and his account was in default and over the limit. Tesco have evidenced that Mr D was sent monthly statements, three default notices, an arrears notice and an over limit notice between March and June 2019.*
- I've seen a default notice from Bank U to Mr D in July 2019. The letter states that Mr D is over his overdraft limit of £6,000. And I've seen copies of Mr D's online banking log ins for his Bank U account. These show almost daily logs in between March and June 2019. Mr D's provided evidence of invoices he expected to be paid during the period – which he explains weren't honoured. However I find it surprising, in particular because of the regular monitoring of his finances, that Mr D thought there would be sufficient funds in his Bank U account to honour the full direct debit payments. And he continued to spend immediately after the direct debits were processed.*
- When Mr D's credit card account was closed in July 2019 he was £1,853 over his credit limit. I'm satisfied that the main reason Mr D was significantly over his credit limit was due to the spending between his direct debit being presented and then later being reversed. I understand that although Mr D made an arrangement to pay with Tesco following the closure of his account, he still owes just over £4,000. Which is over £1,000 more than his credit limit for the card.*

I realise this will be disappointing to Mr D but for the reasons I've outlined above I'm currently thinking of not upholding Mr D's complaint. I'm satisfied that Tesco have met the

burden of proof to load a CIFAS marker. I think it's more likely than not Mr D was dishonest in spending on the funds available on his credit card, and knew that the direct debits would be reversed. And therefore he was spending funds which Tesco never agreed to lend him.

Mr D responded to my Provisional Decision with a number of additional points. I've considered these points below.

Mr D's explained that he wasn't aware he reached his credit limit and he didn't have online banking at the time of the transactions. For the reasons I've outlined above I'm afraid the evidence I've seen doesn't support Mr D's response here. Mr D was sent numerous letters from Tesco's advising him of the current status of his credit card – and clearly showing he was over his limit. So I can't agree with him here. I'm not sure if Mr D is referring to his online banking for Tesco's or Bank U, however I've seen evidence from Bank U that Mr D did have access to his online banking at the time and therefore I think it's highly likely he knew he didn't have sufficient funds available to him to pay his Tesco credit card.

Mr D's also asked why Tesco didn't block his card and allowed him to spend over his limit. I understand what Mr D's saying here – and ultimately this is the action Tesco's did take when they blocked and closed Mr D's account. But, Mr D's arguing Tesco's should have done this sooner – and if they had done so he wouldn't have spent on the funds that were available to him. However, for a number of reasons this doesn't change my outcome. I say this because from Tesco's perspective it appeared that Mr D was clearing the balance of his account – and therefore they applied the credit to his account, giving him the available funds. I can't see any reason why Tesco would initially question this until a pattern of direct debits being returned occurred. And most importantly, whether as Mr D argues, Tesco's could have acted more quickly here isn't the key question in my opinion. I'm satisfied, for the reasons I outlined in my Provisional Decision, that Mr D acted in a deliberately dishonest way. And it therefore follows I won't be asking Tesco's to remove the CIFAS marker here.

I'm aware that Mr D has an outstanding balance with Tesco. I understand that he may be in financial difficulty and I expect Tesco's to treat Mr D positively and sympathetically when making arrangements to recover the debt.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 6 April 2021.

Jeff Burch
Ombudsman