

The complaint

Miss L's complaint is that NewDay Ltd ("NewDay") won't reimburse her after she said she was the victim of fraud.

What happened

Miss L has a credit card account with NewDay. From December 2016 three charges started leaving her account each month, each seemingly to a different merchant and for a total of around £150.

Miss L noticed these charges for the first time in December 2017 and contacted NewDay to ask about them. She was told her card had been used to enter into the subscription services the charges were in relation to. Miss L contacted the administrator for the merchants applying the charges but they didn't have any details of her signing up for the services. They refunded one month's charge from all three merchants to her.

Miss L originally made a complaint to NewDay about the disputed transaction in June 2018. NewDay responded several times over the following years but doesn't appear to have fully investigated her complaint or passed the complaint to its fraud department as it said it would. It offered her £100 by way of compensation for the delays.

In March 2020, after the complaint was brought to our service, NewDay again responded to Miss L's complaint. It said the fraud she'd reported wasn't considered 'typical fraud' and as it had previously advised her to contact the merchant about the dispute, no fraud dispute had been raised.

Miss L was unhappy with NewDay's response. She told us she didn't enter into the subscriptions herself but that no-one in her life would've had access to her card and she didn't know when an unknown third party might've stolen her details.

I issued a provisional decision earlier in year and which said that:

- I didn't think Miss L had been able to provide any plausible explanation as to how someone could've accessed her card details or card without her knowledge. I also felt the transactions she was disputing didn't carry any of the usual hallmarks of fraud and thought it was unclear why she hadn't noticed £150 debiting her account each month for over a year. On balance, I didn't feel there was sufficient evidence her card details had been stolen by a third party and used without her consent. So I thought it was more likely than not she'd authorised the payments.
- The investigator who originally considered the case thought Miss L had unknowingly entered into a continuous payment authority ("CPA"). They thought this because the website detailed on her statements didn't provide any information about a CPA or how a subscription might work. Because she wasn't informed she was entering into a CPA, she couldn't have authorised the payments and NewDay should refund them to her. I didn't agree. I visited the websites the subscriptions were linked to and thought it was likely the terms and conditions were clear about the cost of the subscriptions.

So I didn't agree there were reasonable grounds to ask NewDay to refund the payments.

Miss L didn't accept my provisional decision. In summary she said that:

- NewDay had failed to investigate her complaint sufficiently or promptly and she felt it should've frozen the interest accrued on the disputed payments while it looked into things.
- A new card linked to her account had gone missing around the time the subscriptions were entered into and NewDay hadn't provided sufficient information about this.
- She uses her card online and in store a great deal which provides lots of opportunity for fraudsters to obtain her details.
- Whilst she checked her statements regularly, she would generally check the overall balance rather than the full breakdown of transactions which is why she didn't notice the payments leaving her account. She's also explained how difficult her circumstances were at the time which meant checking her credit card statements wasn't a priority for her.
- She felt she was being penalised for a period of her life when she wasn't paying as much attention to her finances as she generally would've and that NewDay was not being held accountable for its failure to prevent fraudulent activity on her account.
- I'd mentioned the Payment Services Regulations 2017 in my provisional decision, but the payments started in 2016, so she questioned their relevance in her case.
- I'd reference the terms and conditions available on the subscription sites going back to December 2017, but her payments had started in December 2016 so she wasn't sure these terms and conditions applied.

NewDay responded and accepted the provisional decision so didn't have any further information it wanted me to consider.

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've considered the additional information Miss L has provided very carefully but overall, I'm not persuaded to change my mind. I won't repeat everything I've said in my provisional decision (and have summarised above) but I would like to address Miss L's ongoing concerns.

Have there been any plausible points of compromise?

Miss L has said she thinks there have been points of compromise in her case. She's said she uses her card online and in stores a lot. So at any point someone could've obtained her details. But anyone with a credit card will likely use it online or in store to make purchases. And on the whole, merchants are usually required to have measures in place to protect the payment information used. So I don't think general day to day use of a card alone provides plausible evidence a third party likely accessed Miss L's payment details and used them without her consent when considered alongside the other information in this case.

In response to my provisional decision she also raised for the first time a replacement card she's said went missing in September/October 2016, a couple of months before the subscriptions started. But, on balance, I'm not persuaded this would provide a plausible point of compromise.

It's not clear to me why, if a fraudster went to the lengths of intercepting Miss L's card, they would've held on to it for over two months before attempting to use it. I say this because as soon as the new card didn't reach the intended recipient it's likely it would be cancelled and a new one sent out. So it's unclear why a thief would've held on to it for several months, risking the cancellation, before attempting to use it.

It also appears from her statements Miss L's card was used throughout October and November 2016 when the subscriptions were likely entered into and she's not disputed these transactions. It seems unlikely she would've been able to keep using her card if a replacement had been intercepted and activated without her knowledge.

But overall, it seems unlikely someone would go to trouble of intercepting a card, wait for two months and then only attempt activity which might be cancelled a month later. Although some fraud is opportunistic and I wouldn't say it follows a particular pattern, in this case, what Miss L has described doesn't carry any of the hallmarks of how this type of fraud tends to be perpetrated.

I've noted Miss L's comments about not checking her statements in detail each month and the reasons why, and I'm sorry to hear of the circumstances she's described. I can see why, given this, she might not have checked her transaction history in detail each month. But my findings are not only based on the fact she didn't raise concerns about the payments sooner. When considering everything in the round, I don't think there's sufficient evidence Miss L has more likely than not been the victim of a scam. I think it's more likely than not she authorised the payments she's disputing.

And it does seem pertinent to note the unexpected subscription charges in this case have applied after the end of a free trial because the subscriptions seemingly weren't cancelled, during a period of Miss L's life where she's said, due to her circumstances, she couldn't concentrate on her finances.

Are the PSRs 2017 relevant in this case?

In my provisional decision I've said the Payment Services Regulations 2017 ("PSRs 2017") were relevant in Miss L's case. Miss L has pointed out that the payments in question started in December 2016 – before the PSRs 2017 were in effect. And I'm sorry for any confusion caused, she's correct in pointing out these regulations wouldn't apply in her case.

The regulations that apply in her case are actually the Payment Services Regulations 2009 ("PSRs 2009"), specifically sections 55 and 57. These sections set out that a payment has been authorised when the payer has consented to the payment being made, and has used the payment instrument and agreed process as set out in the terms and conditions of the account.

In the PSRs 2017, which is a revision of the PSRs 2009, the same is set out under sections 67 and 72. And it's the overall definition of authorisation, which is the same in both PSRs 2009 and 2017, that I have relied on when reaching my decision.

Although I'm sorry for any confusion caused, I remain satisfied Miss L likely authorised the payments in line with the definition of authorisation set out in the PSRs 2009 which are the relevant regulations in her case.

The terms and conditions on the subscriptions sites

Miss L has not said the subscription sites weren't clear about the fact she was entering into a continuous payment authority ("CPA"). So her testimony doesn't provide any evidence this was the case back in November/December 2016 when the subscriptions were entered into.

However, the investigator made this assumption when they reached their findings on Miss L's complaint and upheld it on this basis. They felt because there was no clear information about a CPA they could see, Miss L couldn't have authorised the payments because she didn't know she was agreeing to make any.

I felt it was necessary to address this point in my provisional decision. In her response to the provisional decision, Miss L has questioned how the terms and conditions from December 2017 are relevant in her case as the payments started the year before. So I wanted to clarify my position on this point.

From what I can see from my own independent visits to the subscription sites, which is limited because I don't have subscriptions, the terms and conditions are available and clear information about the payments due is provided. And I don't have any reason to believe this wouldn't have always been the case. Again, this is not an argument or complaint Miss L has ever made as she's said she didn't visit the sites at all.

In my provisional decision I mentioned that currently, the terms and conditions on each of the subscription sites the payments were linked to were clear about the fact that a monthly fee would be charged after an initial trial period. I also explained that I could only see the current version of each website and I was mindful of the fact Miss L would've accessed these sites several years ago. Although I couldn't know for sure what they said at the time, I thought it was more likely than not the merchants gave her sufficient information about the payments she was making and therefore they were authorised.

I'd also used an archive website search and could see that as far back as December 2017, the same terms and conditions had been displayed on the sites. Before this, as far as I can see, it's not possible to access what the terms and conditions say. So I can't see any information about this before this point.

Because the merchants appear to have provided the same information as far back as December 2017, I think it's more likely than not they also provided this information in December 2016.

But again, I don't think there's any evidence in this case to suggest Miss L wasn't given sufficient information about the payments she was making. So as I've outlined above, I think it's more likely than not she authorised them and is liable for them.

Was NewDay's investigation sufficient?

Whilst I think NewDay could've answered Miss L's complaints sooner than it did, I haven't seen any reason she was unable to bring the complaint to our service sooner if she wasn't happy with the time things were taking. And ultimately, she did bring the complaint to our service before she received what she felt was a sufficient response from NewDay. From what I understand, NewDay has made a payment of £100 in recognition of these delays.

Miss L has said NewDay could've frozen the interest while it looked into things but there's no requirement for it to do so. If it had found the payments hadn't been authorised by her she wouldn't have been liable for any interest. And whilst I can see NewDay took a long time to answer her complaint and additional interest would've been accrued during this period, as I've mentioned, it seems she reasonably could've brought the complaint to our service sooner than she did to mitigate any loss.

Overall, I think NewDay has reached a reasonable conclusion in holding Miss L liable for the payments she's disputed. So this amount is subject to the interest set out in the terms and conditions of her account.

My final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss L to accept or reject my decision before 23 August 2021.

Faye Brownhill
Ombudsman