

The complaint

Mr K complains that NewDay Ltd (“NewDay”) is holding him liable for an online transaction which he says he didn’t make or otherwise authorise.

What happened

The circumstances of this complaint are well known to both parties, so I won’t repeat them all again here in detail. But I will provide a brief summary of events below.

Mr K has an Aqua credit card with NewDay.

In late December 2020, Mr K contacted NewDay to dispute a £1,871.29 (\$2,503.36 USD) transaction made using his credit card on 2 December 2020. This was an online transaction for goods. NewDay blocked Mr K’s card and initially refunded the disputed funds to his account. But, following a chargeback claim, NewDay re-debited the funds, which Mr K raised a complaint about.

NewDay says Mr K informed it that he didn’t authorise the transaction; he was still in possession of his card and that he didn’t suspect it had been compromised. NewDay raised a chargeback, which the merchant concerned defended. The merchant provided evidence showing that the order totalling £1,871.29, was made using Mr K’s card and delivered to his address. For these reasons, NewDay didn’t continue with the chargeback process, refused to refund the funds to Mr K and held him liable for them.

Unhappy with this response, Mr K referred his complaint to this service. He maintained he didn’t make the transaction. He added that his card was always safe in his wallet, which only he had access to. He also mentioned that he had used his card at a petrol station and that the alleged fraud occurred after that.

One of our investigators considered the complaint and didn’t uphold it. In short, he thought the single transaction was not the type of spending he would expect to see from a fraudster. He said it was possible that Mr K’s card could’ve been compromised at the petrol station. However, he added that for an unknown fraudster to gain any benefit from the alleged fraud (i.e. take possession of the order concerned), they would’ve needed to obtain details of, and access to, Mr K’s address without him knowing – which our investigator didn’t find plausible. He also considered that NewDay had acted reasonably in deciding not to continue with the chargeback process based on the evidence the merchant provided.

Mr K responded saying he didn’t agree with our investigator’s findings. In short, he said he found the proof of delivery evidence to be questionable, as there was no signature or photograph to support the goods had been delivered to his address. He suggested that it was possible a fraudster obtained both his card and address details, waited for the delivery to his address and intercepted it. Mr K also added that if he had made the transaction – which he denies – he would be able to make a section 75 claim, as he didn’t receive the goods.

Our investigator's position remained the same. He responded saying that the delivery evidence would be sufficient to prove delivery under chargeback and section 75. He also said he found it unlikely in the circumstances that the order could've been intercepted.

As an agreement couldn't be reached, the complaint has been passed to me to make a decision.

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 agree with the conclusions reached by the investigator for reasons I set out below.

The relevant regulations in this case are the Payment Services Regulations 2017 ("the 2017 Regulations"). In short, they state, amongst other things, that a payment service provider (in this case, NewDay) is generally required to refund the amount of an unauthorised transaction. However, NewDay can hold Mr K liable for any disputed transactions if the evidence suggests, that it's more likely than not, that he made or otherwise authorised them. Where credit is involved, as is the case here, the 2017 Regulations make provision for the Consumer Credit Act 1974 to apply in place of certain regulations of the 2017 Regulations, including those provisions which govern the apportionment of liability in unauthorised transactions.

I'm satisfied from the technical evidence NewDay has provided that Mr K's genuine card was used to make the online transaction concerned. However, Mr K's position is that he didn't authorise this transaction. He confirmed to our investigator that he kept his card in his wallet, which was always safe. He also confirmed that although he lives with his wife and children, nobody has access to his card apart from himself. I can see from NewDay's internal notes, that Mr K said he had spoken to those in his '*immediate circle*' – family and friends – and they confirmed they hadn't made the transaction.

With the above in mind, I've considered whether a third party unknown to Mr K could've made the transaction. I've taken into account what Mr K has said about the transaction occurring after he had used his card at a petrol station. Having thought about this carefully, I'm not persuaded, on balance, that an unknown third party carried out the transaction.

I say this because although Mr K says the transaction happened after he used his card at a petrol station, I haven't seen any evidence to suggest Mr K's card was compromised at that point, or indeed any other point thereafter. Even if I could conclude that Mr K's card was somehow compromised at the petrol station, I don't consider the online transaction to be indicative behaviour of an opportunistic fraudster. Usually, I'd expect a fraudster to utilise the full balance of a card – making several transactions over a short period. This would allow them to maximise gains before the account holder could notice the transactions and block their card. However, in this instance, Mr K's card was used to make a single online transaction with no further alleged fraudulent transactions made or attempted between 2 December 2020, and when the card was blocked in late December 2020 – which to my mind, is unlike an opportunistic fraudster.

Further, I've seen a proof of delivery document from the merchant showing that the order concerned was delivered to Mr K's address. Mr K says this is questionable, as there is no signature or photograph to support the goods were actually delivered to him. So, he suggests a third party could've intercepted the order.

Having considered what Mr K has said, I'm not persuaded that a third party not only somehow obtained Mr K's card and address details to place the order – but also used Mr K's address for delivery with the intention to obtain the order from his home. Whilst I acknowledge Mr K's point about the order being intercepted, I find this unlikely. In any event, in the absence of any evidence contradicting the proof of delivery document provided by the merchant, I can't fairly conclude, on balance, that the order wasn't delivered to Mr K's address.

In Mr K's response to our investigator's findings, he referred to, amongst other things, section 75 of the Consumer Credit Act 1974. As Mr K didn't raise this in his initial complaint to NewDay, I'm unable to consider this point further.

I acknowledge Mr K strongly denies authorising the online transaction. However, taking all the above factors together, I consider it's more likely than not, that he did. So, it follows that I'm satisfied NewDay acted reasonably by not continuing with the chargeback process.

My final decision

For the reasons set out above, my final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 7 October 2021.

Tony Massiah
Ombudsman