

The complaint

Mr P complains that HSBC UK Bank Plc won't refund him for transactions on his account which he didn't authorise. HSBC registered his details with CIFAS the UK's fraud alert service. He wants the funds refunded and the CIFAS marker removed. His complaint is brought on his behalf by his mother who I'll refer to as Ms B.

What happened

Mr P had a deposit account and a current account with HSBC.

Mr P told us he kept his card and PIN in a purse. Mr P told us he lost his purse containing his account details and card but because he didn't use his account much, he hadn't realised the purse was lost. He didn't explain which specific account details were in the purse.

Mr P says that on 12 July 2018 £1,450 was taken out of his account without his authorisation. The funds were transferred from his deposit account to his current account and then spent mainly through Chip and PIN transactions and two currency transactions.

HSBC said that a transfer from Mr P's savings account to his current account was made using online banking on 12 July 2018.

A cheque for nearly £30,000 was paid into Mr P's account on 8 August 2018. And Mr P's account was blocked.

HSBC have said that as a result of some fraudulent transactions on Mr P's account they closed the account on 28 August 2018 with immediate effect. They also recorded a CIFAS marker against him.

Mr P complained to HSBC about the closure of his account and requested that his case be reviewed. The complaint about the closure of the account has been dealt with by this service already.

Mr P then came to our service complaining about the disputed transactions and the CIFAS marker. We raised the complaint with HSBC.

HSBC said they blocked and reviewed Mr P's account following a fraudulent cheque being paid into the account. They said that despite trying to contact Mr P to discuss the credit in more detail they had received no response. Following the review and investigation they had decided to close the account and wrote to Mr P on 31 August 2018. HSBC have said that at the time Mr P didn't mention the disputed transactions. They also said that the transaction was a transfer from his savings account to his current account and there was no evidence that Mr P had suffered a loss.

Mr P was unhappy with HSBC's response so asked our service to investigate.

One of our investigators looked into the complaint. She said that Mr P had likely not authorised the transactions. As some of the transactions were partly funded by an overdraft, she thought HSBC should refund Mr P £44.62. She thought that Mr P shouldn't be refunded

anything else because he had been grossly negligent in keeping all his bank details including his PIN with his card in a purse. He had lost this purse but hadn't reported it to HSBC. She thought he had failed to keep his information secure.

In relation to the CIFAS marker she thought the bank hadn't acted fairly in registering the marker. They had tried to contact Mr P as no response was received, they closed the account and registered the marker. Our investigator had thought that HSBC didn't have enough evidence that Mr P had carried out or was aware of the fraudulent activities or he was aware that his account was being used for fraudulent purposes. She didn't think HSBC had acted fairly when it registered the marker against Mr P.

HSBC provided the investigator with further information. The investigator issued a second view changing the outcome she initially reached. On reflection she didn't think HSBC should do anything. She thought Mr P had authorised the payments because he hadn't mentioned any bank details being lost in phone calls to the bank. She thought that as Mr P had contacted the bank after the fraudulent activity to try and add a new payee, his account details can't have been lost. And she thought it was more likely that Mr P was aware of the fraudulent activity on his account.

Mr P was unhappy with the view. He said he hadn't authorised the transactions and he didn't know about the credit into his account.

Because Mr P didn't accept our investigator's view the complaint was passed to me for a decision.

My provisional decision

Having considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint, I issued a provisional decision in which I said:

Disputed transactions

Generally, HSBC can hold Mr P liable for the disputed transactions if the evidence suggests it's more likely than not, he made or authorised them himself.

I am satisfied from the bank's technical evidence that Mr P's genuine card and PIN were used to make the disputed transactions. But the regulations relevant to this case say that is not, on its own enough to enable HSBC to hold Mr P liable. So, I also need to think about whether the evidence suggests it's more likely than not Mr P consented to the disputed transactions being made.

From what I've seen, I don't think it's unreasonable for HSBC to conclude Mr P authorised the transactions. I say this because:

- *Mr P didn't report the disputed transactions to the bank until he came to our service in 2020. Mr P contacted the bank following the disputed transactions on three or more occasions and never mentioned them.*
- *The transfer from his deposit account was carried out using online banking. Mr P had gone into branch to set up his online banking on 10 July 2018. On the 12 July 2018 he contacted HSBC by phone to reset the code. The adviser confirmed online banking was available for him to use. The transfer occurred and the funds were spent from his current account on 12 and 13 July 2018. For this to be the fraudster they would have needed to intercept Mr P's card, PIN and online banking after the phone call and before the funds were spent on the 12 and 13 July. Which leaves a very*

small period of time and seems unlikely. I also think it would be unusual to have his online banking details in his purse.

- Mr P received a letter from HSBC dated 23 July 2018 informing him that his account had been overdrawn. I think Mr P must have known at that point that someone else was using his account. The amount that was spent from his account was £1,450 which is a substantial amount of money, so I find it surprising he didn't contact the bank at this time.*
- Mr P had multiple opportunities to inform HSBC of the loss of the money or the loss of his card, but he didn't.*

Because of this I think it's more likely that Mr P made the transactions himself or authorised a third party to do so. It follows I won't be asking HSBC to do anything about the Disputed transactions.

CIFAS marker

The marker that HSBC have filed with CIFAS is intended to record that there's been a 'misuse of facility' – relating to using the account to receive fraudulent funds. In order to file such a marker, they're not required to prove beyond reasonable doubt that Mr P was guilty of a fraud or 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 a bank must first be able to show that fraudulent funds have entered Mr P's account, whether they are retained or pass through the account. Secondly, the bank will need to have strong evidence to show that Mr P was deliberately dishonest in receiving the fraudulent cheque and knew it was, or might be, an illegitimate payment.

However, a marker shouldn't 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 account holder the opportunity to explain the activity on their account in order to understand their level of knowledge and intention.

I need to assess whether I think there is sufficient evidence to meet this standard of proof – and therefore, whether HSBC acted fairly in loading a CIFAS marker against Mr P.

For HSBC to have fairly loaded a CIFAS marker against Mr P they need to have evidence to show that there was an attempt to deposit fraudulent funds into his account. I've requested evidence from HSBC to show that the cheques attempted to be deposited in August 2018 were fraudulent. I've asked for HSBC to provide evidence that they received contact from the paying bank and/or an explanation for why the cheques are fraudulent. However, I've not seen any evidence to satisfy me this is the case.

I appreciate that the transactions on Mr P's account were very suspicious. I think that HSBC may well be justified in suspecting that an identified financial crime has been committed,

but that on its own isn't enough – without any proof from the sending/paying bank to say the cheques were fraudulent I can't fairly say that the CIFAS marker was correctly recorded.

HSBC must be able to provide clear, relevant and rigorous evidence. As HSBC haven't been able to provide me with such evidence, I don't think that HSBC have met the standard of proof to register a CIFAS marker against Mr P. So, I am minded to ask HSBC to remove the marker.

I've considered the impact that this marker has had on Mr P. Mr P has told us that he's been unable to open an account and have his own financial freedom and he couldn't get his bursary paid. And I can imagine this would be very difficult at the start of someone's career. However, I am also aware that although the marker was registered in August 2018, Mr P didn't raise the issue of the marker until he brought a case to our service in January 2020, so I think the impact on him was small. I think it's fair and reasonable for HSBC to compensate Mr P with £150 for the distress and inconvenience caused to him.

In conclusion subject to any further representations, I am currently minded to find that HSBC have acted fairly in holding Mr P liable for the disputed transactions. However, HSBC should remove the CIFAS marker registered against Mr P and compensate him.

Responses to my provisional decision

HSBC responded to my decision by contacting the original bank who was able to provide confirmation that the cheques were fraudulent. HSBC then provided me with evidence that the cheques that were attempted to be paid into Mr P's account were fraudulent. This was evidence from the sending bank that the cheques were drawn on an account that had been closed four years before the cheque was presented.

I then contacted Ms B and made her aware of the new evidence. Ms B responded with the following comments:

She was concerned that HSBC was talking about £60,000 when originally, they were speaking about £ 29,000 to her - also Ms B said the cheques had been paid in three years ago so wasn't clear about why I mentioned four years. She also said that Mr P had tried to let the bank know about his card being lost.

Now that everyone has had an opportunity to comment on the further evidence I can now go ahead and issue my final 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.

I've also considered again my provisional findings in the light of HSBC's new evidence and I have taken into consideration Ms B's comments.

I appreciate Ms B is trying to understand what went on with Mr P's account. It must be quite distressing for her as Mr P has lost some of his life savings as a result of this situation.

In response to Ms B's submissions, I would like to clarify for Ms B's benefit that the information I received from HSBC- is an email forwarded from the original bank and it

confirms that the two cheques which were attempted to be paid into Mr P's account were fraudulent.

Ms B has said she was told it was only one cheque for £29,000 which was paid into her son's account. As I have mentioned two cheques for £29,000 were attempted to be paid into Mr P's account in August 2018. Only one of them was successfully paid in. The cheques were drawn from an account that had been closed 4 years earlier.

Fraud marker

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

I have previously set out the standard that the bank must meet but I set it out here again for Ms B's benefit.

The marker that HSBC have filed with CIFAS is intended to record that there's been a 'misuse of facility' – relating to using the account to receive fraudulent funds. In order to file such a marker, they're not required to prove beyond reasonable doubt that Mr P is guilty of a fraud of 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 a bank must first be able to show that fraudulent funds have entered Mr P's account, whether they are retained or pass through the account. Secondly, the bank will need to have strong evidence to show that the consumer was *deliberately* dishonest in receiving the fraudulent payment and knew it was, or might be, an illegitimate payment. But a marker shouldn't be registered against someone who was unwitting; there should be enough evidence to show *deliberate* complicity.

So, I need to consider whether HSBC have sufficient evidence to meet the standard of proof and load a marker for misuse of facility with CIFAS. Having looked at all the information provided, I'm satisfied they have, and I say this because:

- I've seen evidence from HSBC showing that another bank notified them that the money paid into Mr P's account on 8 August 2018 was fraudulent.
- Mr P has explained he has no knowledge of the cheques being deposited into his account – however to deposit a cheque into Mr P's account you'd need his debit card/account details etc – and Mr P didn't report his card lost or stolen at the time.
- Mr P must have been aware that someone else had access to his account. He received a letter on 23 July letting him know the account was overdrawn and he would have realised that his savings had been spent. He didn't contact the bank at the time which I would have expected him to.
- Ms B has said that Mr P tried to report his card stolen by going into branch and by calling the bank. The evidence I've seen does not show this.

- I also think it very surprising a fraudster would attempt to deposit £60,000 into an account they weren't confident they'd have access to.

So, when I weigh everything up, I'm satisfied that at the time the bank loaded the CIFAS marker they met the burden of proof required. In reaching this conclusion I've considered the evidence provided by HSBC along with Mr P's explanation. In doing so I'm satisfied that Mr P was *complicit* in receiving fraudulent funds. And HSBC acted fairly in loading the marker. So, I won't be asking the bank to remove it.

I know Ms B believes that HSBC has deliberately planned this against her son. This is a serious allegation. I appreciate that Ms B is upset, and I want to assure Ms B that I've not seen any evidence to support this.

I have considered everything that Ms B has said, and It hasn't changed my position.

For all these reasons and the reasons outlined in my provisional decision, my view on what the fair and reasonable outcome is different from what was set out in my provisional decision. I am now satisfied that the bank has met the burden of proof to load a CIFAS marker against Mr P.

My final decision

My final decision is that I reject the complaint

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 5 October 2021.

Esperanza Fuentes
Ombudsman