

## The complaint

Mr S complains about the way American Express Services Europe Limited (AESEL) – I'll refer to it as American Express – handled a chargeback claim he sought to make when he couldn't go on holiday during the Covid-19 pandemic.

## What happened

Mr S used his American Express card to pay a deposit for a holiday overseas, which he booked through a third party A. Unfortunately, shortly before the balance fell due, the UK and other governments – notably, the one in the country to which Mr S intended to holiday – brought in travel and other restrictions due to the Covid-19 pandemic. Mr S wasn't able to travel. He contacted A to see if it would refund his payment.

A wasn't willing to do so. It said the Covid-19 pandemic represented a *force majeure* event (one in which the contract could not be performed due to factors over which the parties had no control), but that it would be retaining his deposit to cover costs it had incurred. It said Mr S could make another booking but would have to keep to the payment schedule to avoid losing the deposit. Mr S was unwilling to pay further money towards the payment schedule and so his booking lapsed. He turned to American Express to see if it could assist in recovering his money.

American Express instigated a chargeback claim against A and credited his account with the deposit amount. It twice told him that the credit wouldn't be reversed, but this is what happened following A's response to the chargeback claim. American Express has acknowledged it gave Mr S wrong information in this respect and offered him £75 compensation. But it says it wasn't wrong to redebit Mr S's account. It says its letters told Mr S this was a possibility, depending on A's response. And A had come back with documents contesting the chargeback, including the booking terms that it said entitled it to retain the deposit.

Our investigator thought the £75 American Express had offered was a fair way to address the incorrect information it gave Mr S. But he didn't agree that A's deposit retention policy provided a suitable defence in the circumstances at play in Mr S's case. The investigator noted that at the time Mr S contacted A, the government restrictions were already in place in the country Mr S was planning to visit. Those restrictions prevented inbound and outbound flights as well as various activities that were the primary purpose of Mr S's booking.

The investigator considered this meant A was unable to ensure performance of the contract it had with Mr S. That amounted to a frustrated contract, which was established prior to the point at which A had sought to terminate it (the date by which the balance was past due). The investigator further noted guidance from the Competitions and Markets Authority (CMA) that suggested where a contract couldn't go ahead because of lockdown laws, it would expect a business to provide a full refund. He felt this should apply in Mr S's case, further noting that the contract between Mr S and A made no provision for retention due to fees or other costs.

The investigator concluded that American Express therefore hadn't treated Mr S fairly in

accepting the defence A put forward in response to the chargeback claim. He proposed that in addition to the £75 offered, American Express should refund Mr S the £400 deposit he'd paid, with interest.

American Express hasn't accepted the investigator's recommendation. It maintains that A was entitled to retain the deposit under the booking terms.

### **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'm disappointed to note that despite several requests from our investigator, American Express hasn't engaged with the issue of the CMA guidance, or the inability of A to perform the contract as agreed. The detail of the holiday arrangements that form the contract between Mr S and A appear to meet the definition set out in the Package Travel and Linked Travel Arrangements Regulations 2018, which among other things makes A responsible for performance of the included travel services.

Based on the timeline, there seems to me no question that the contract between Mr S and A was frustrated as a result of the restrictions put in place due to the Covid-19 pandemic. A's own position in response to Mr S's initial contact was that the pandemic restrictions amounted to a *force majeure* event. It appears to have accepted, then, prior to the balance becoming due, that it was not in a position to perform its obligations under the agreement.

Where this is the case, the usual remedy in law for a frustrated contract is that the parties are released from their respective obligations and as far as possible, their original positions are restored with the contract coming to an end. That would mean Mr S had no obligation to pay the holiday balance to A by the specified date, and that A had no contractual right to retain his deposit on the basis that he had failed to do so. The defence on which A relied and American Express accepted – that the booking terms entitled A to retain payment – doesn't appear to me to be supported by the evidence it had available at the time.

I'm not entirely sure that the reason code used for the chargeback claim was the correct one. Although the services weren't provided to Mr S, the obligation to do so no longer existed. As such, it might have been more appropriate to raise the claim on a 'credit not processed' basis, should that be a valid chargeback ground in the American Express card scheme rules. I can't be certain of this as American Express has declined to provide a full set of the chargeback reasons. But it does seem even less likely that Mr S would have had full knowledge of the various reasons under which he might be able to raise a claim. So I think it was for American Express to ensure the most appropriate reason was used when it progressed the claim on his behalf.

I note that the CMA guidance is a) not a definitive explanation of the accepted legal position and b) was issued a week or so after American Express sent its letter informing Mr S that the chargeback claim had been defended. However, I do not think either of these things prevented American Express from taking the guidance into account when Mr S told it he was unhappy with the claim outcome. To me it seems to address directly the situation American Express was being asked to deal with, and as such informs whether American Express treated Mr S fairly in dealing with the dispute. Given that American Express hasn't suggested it considered the CMA guidance, I'm sorry to say that I find it didn't treat him fairly.

Had it done so, I think it's more likely than not that these two factors would have present a strong rebuttal of A's position and the outcome of Mr S's chargeback claim would have been quite different. The absence of any valid contractual provision entitling A to retain the deposit

or fees/costs incurred suggests to me that it would be obliged to restore Mr S's position by refunding him in full. Although it is potentially open to Mr S to seek recovery from A through other channels, such as a legal claim, this would undoubtedly put him to additional cost and inconvenience which would have been avoided had American Express dealt with his claim fairly.

### **Putting things right**

In the circumstances, I think the fair way to resolve matters would be as the investigator suggested; that is, that American Express pays Mr S £400, with interest, in addition to the £75 it has offered for the other customer service shortcomings identified.

### **My final decision**

My final decision is that American Express Services Europe Limited (AESEL) should, within 28 days of Mr S accepting my decision, take the following steps:

1. unless it has already done so, pay Mr S the £75 it offered representing suitable compensation for the distress he experienced due to the incorrect information it gave him
2. pay Mr S £400 representing the deposit A retained that he should have been able to recover via chargeback. Mr S should be aware that accepting this might well have an impact on any right he might have to seek recovery of this sum from A
3. pay interest on the amount in 2., calculated at 8% simple annually from 22 September 2020 (being the point at which it should have represented the chargeback claim) until the date it pays this settlement. If American Express deducts tax from the interest element of my award, it should confirm to Mr S that it has done so and provide him with the relevant tax deduction certificate

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 26 May 2022.

Niall Taylor  
**Ombudsman**