

## The complaint

A company, which I'll refer to as B, complains that Metro Bank PLC won't refund disputed transactions debited from the company's business current account.

Mr M, who is the director of B, brings the complaint on B's behalf with assistance from his sister. He says he did not authorise these transactions.

## What happened

I issued my provisional decision on this complaint on 9 March 2022. The background and circumstances of the case and the reasons why I was minded to uphold it were set out in that decision. I have reproduced the provisional decision in italics below:

*Mr M is complaining about debit card transactions for more than £20,000 which were made in the early hours of the morning of 24 January 2020.*

*I have included a list of the transactions and relevant events in the table below:*

Date	Time GMT	Amount	Payee	Relevant information	Running total of spending
23/1	23:16	£7.95	Income Invest – Dating Service		£7.95
	23:37	£57.33			£65.28
	23:57	£256.32			£321.60
24/1	00:19	£645.89			£967.49
	00:19			Text message sent	
	00:50	£647.78		Attempted transaction declined	
	00:51			Text message reply received	
	00:53	£512.82			£1,480.31
	01:06	£647.78			£2,128.09
	01:28	£648.82			£2,776.91
	01:45	£648.87			£3,425.78
	02:01	£1,404.35			£4,830.13
	02:18	£1,936.63			£6,766.76
	02:36	£5,127.17			£11,893.93
	02:59	£5,129.06			£17,022.99
	03:28	£5,131.10		Declined –	

				exceeded daily purchase amount	
	03:30	£1,939.56			£18,962.55
	04:14	£1,408.33		Declined-exceeded daily purchase amount	
	04:38	£197.70	Multitax SP		£19,160.25
	04:56	£385.20			£19,545.45
	05:16	£583.70			£20,129.15
	05:36	£1,974.00		Declined-exceeded daily purchase amount	
	05:37	£876.55		Declined-exceeded daily purchase amount	
	05:47	£3.00		Contactless	£20,132.15

*Mr M was working abroad in Poland. He recalls that he arrived at his hotel around 6pm, completed some work paperwork, used the gym facilities and then went out for a meal alone at a restaurant that had been recommended to him. The restaurant was around a 15 to 20 minute walk along a straight road from the hotel. Mr M recalls that he arrived there around 10pm and sat downstairs whilst he ate steak and chips. He then went upstairs to watch some live music until midnight when the venue closed.*

*Mr M recalls that he felt fine when he left the restaurant but as he started the short walk back to his hotel, the cold and his age caught up with him and he needed to take a comfort break. Mr M went into a bar to use the toilet there. He recalls that it was quiet. He explains that he ordered a drink after using the facilities out of courtesy. He remembers a lager being brought to him whilst he was sitting in a comfortable seating area. Mr M paid £7.95 for the drink using B's debit card. This transaction took place at 00:16am CET/23:16 GMT.*

*This is the last thing Mr M can remember. He is not aware of whether he finished the drink or not. He says that after beginning to consume the drink, he has absolutely no memory and nothing like this has ever happened to him before. Mr M explains his next memory is being with the Polish Police in the car park adjacent to his hotel at around 7.00am. He was blood stained and badly injured. Mr M has no recollection of how he got to the car park or how long he had been there. He suspects his drink was spiked.*

*Mr M said his debit card, driving licence and a small amount of money were missing, so he assumed he'd been mugged. At that time, Mr M did not know about the other transactions which had been made on B's account. He explains he only discovered that spending when travelling back to the UK and so missed the opportunity to report this to the Polish Police.*

*Mr M needed emergency medical treatment following the assault. He'd lost consciousness and had no memory. He was treated at two hospitals in Poland including specialist maxillofacial care. He was suffering from concussion, a fractured jaw and facial cuts that*

*required stitches. His torso was extensively bruised.*

*Whilst Mr M was seeking medical assistance, his wife contacted Metro to block the missing card. She also arranged to fly to Poland to support Mr M on his journey back to the UK.*

*Later in the day on 24 January, Mr M contacted Metro to try and get some emergency funds to pay for a taxi to transfer him from the first to the second Polish hospital. Metro did not tell Mr M about the transactions that were due to debit B's account.*

*Mr M was well enough to fly home on 25 January. Upon landing in the UK, he had further hospital treatment. The pending transactions then debited B's account, so Mr M raised a fraud claim on 26 January 2020.*

*Mr M explains that when he initially spoke to the bank, both in branch and over the phone, it was acknowledged this had been an organised fraud. But when the claim was escalated to the bank's fraud specialists, that position evolved.*

*The bank then concluded that Mr M had authorised the transactions so said it was not responsible for refunding them.*

*Unhappy with the bank's position, Mr M complained. He didn't think the bank's position was fair. In particular, he raised concerns over the high daily spending limit B's account had. He pointed out that nowhere in the terms and conditions did it say just how much a day could be spent on card transactions. He points out that the cumulative spend for the nine months B had banked with Metro before this incident happened was around £30,000 in total so for B to spend £20,000 in one night is considerably far removed from the usual spending pattern.*

*On 24 March 2020 the bank issued its final response letter and said it was unable to uphold the complaint. It explained B's genuine card and PIN were present for each transaction and that a text message was received from Mr M's registered mobile number confirming the account activity as genuine. It felt there were inconsistencies in Mr M's version of events. It said Mr M's lack of memory of the evening calls into question his ability to confirm which transactions are fraudulent and which may be genuine. It pointed out that Mr M's wife had told the bank Mr M had been mugged but he had not told the bank this when explaining what had happened. Metro was also concerned about why Mr M's mobile phone was still in his possession the following day. It was not persuaded that a person acting fraudulently would have returned the device back to Mr M.*

*Mr M responded to the bank and pointed out there were factual inaccuracies in its final response. He was upset and offended at the bank's response which he considered effectively suggested he had fabricated this experience. He felt the bank's investigation was incomplete and unreliable as he'd had to tell them there had been five transactions declined that evening. Mr M felt the bank had missed significant opportunities to intervene. He pointed out that after the first text, further transactions for around £19,000 were paid to the merchant and a further four transactions of approximately £1,000 to a second merchant. Mr M felt Metro ought to have been concerned given the increasing value of the transactions occurring in the middle of the night in a foreign country. The bank said there was nothing more it could do and suggested Mr M referred his complaint to this service.*

*When submitting its papers to this service, Metro said:*

- There was no explanation as to how a third party could have obtained Mr M's PIN*

- *Mr M's phone is locked by facial recognition so no other person could have opened it and replied to the verification text message*
- *The transactions are regularly spaced throughout the period in question which indicates use by the customer*
- *Mr M has no memory of the evening but says he wouldn't have approved these transactions. But he also says he has no memory of contacting the Polish Police but says that he did. These two positions contradict.*

*Our Investigator considered the matter and recommended the complaint be upheld. She wasn't persuaded Mr M had authorised the transactions. She felt, on balance, that Mr M's drink had been spiked. She thought someone could have obtained his phone, unlocked it by holding it in front of his face and then responded to the text message Metro sent. She felt it was possible for bar staff to have observed Mr M's PIN when he paid for his drink. She didn't think Mr M had been grossly negligent.*

*Metro didn't agree. It accepted there are reports of venues taking advantage of patrons by spiking drinks and charging multiple transactions without the account holder's knowledge.*

*But said that did not mean this is what happened here or that transactions in this type of establishment should automatically be considered unauthorised. It pointed out that venues providing adult entertainment are expensive which can lead to patrons spending more than they realise.*

*It said there was no doubt that Mr M had been assaulted but it was hard to say if it had any bearing on the outcome of the complaint. It said that Mr M could have been assaulted in the bar or in an unconnected incident after he left the bar. It said it was unclear when the debit card left Mr M's possession and suggested it could have been taken from him in the bar, or that he might have been mugged after leaving the bar or that he lost the card somewhere.*

*It pointed to previous decisions made by the Financial Ombudsman Service where it had been concluded that being intoxicated or drugged would not prevent a consumer from being able to consent to making a payment. It said it could just as likely be the case that Mr M's lack of memory that night was the result of excessive but voluntary consumption of alcohol.*

*It didn't feel it was likely that a third party had held Mr M's phone to his face to unlock it. It thought that seemed less likely than Mr M accessing the phone himself to reply to the text.*

*Our Investigator's view was unchanged. She said that the spending taking place was high and should have triggered more contact from Metro than one text.*

*Metro asked for an Ombudsman to consider the complaint, so it has been referred to me for a final decision.*

*My further investigation*

*As part of my investigation into the complaint, I listened to recordings of the phone conversations Mr M had with the bank.*

*In the first call Mr M had with the bank's investigator, he explained he was knocked unconscious but does not recall what time it happened. He said that someone came from behind and bashed him and that's all he can recall. I asked him whether he was in the bar, near the car park or somewhere else entirely when this happened. I asked him if he'd been attacked by one person or a group, whether there had been an argument or a struggle and whether he'd tried to fight back. I asked if Mr M thought the attack was connected to the bar*

*in some way.*

*Mr M explained that due to his injuries he had no recollections but thinks he was hit from the back or pushed from behind. He thinks the bar was involved in the attack as the majority of the fraudulent transactions were linked to this location.*

*Mr M also told the bank's investigator that he could remember looking for his phone for a period of time. I asked Mr M where he was looking for the phone, whether it was in the bar or elsewhere and how it had left his possession. I asked Mr M if he could remember finding it again. Mr M said that he did not recall saying that to the bank but that he normally keeps his phone in his right-hand pocket. I'd asked Mr M about the phone's location data in case that helped to trace his movements. But Mr M had performed a factory reset on the phone after there had been attempts to log into his work email address so could not provide any data.*

*I asked Mr M about how much cash he had on his person, his watch and where he usually kept his bank card and driving licence. I explained that on the face of it, a bank card and a driving licence are perhaps less attractive to an opportunistic mugger than cash or a watch. Mr M explained that he'd had a small amount of Polish Zloty (less than £5 equivalent) and that had been stolen along with his bank card and driving licence.*

*When Mr M regained consciousness, he was still wearing his watch, an early edition Apple Watch, and still had his phone and the empty wallet where the cards were kept.*

*I acknowledged that Mr M was in a bad state when he regained consciousness. I asked him if he could recall whether there was fresh blood on his clothes or whether the wounds had perhaps started to clot, to try and gain a clearer indication of approximately when the attack may have happened. Mr M explained that he did not receive any immediate first aid from the Polish Police so did not think his cuts were openly bleeding at this point.*

*Mr M had provided a screenshot of a record on his phone showing that he attempted to dial "#911" at 7:29am. But the Polish emergency services number is either 112 or 997 so I was unsure if that call had connected. I asked Mr M if he called speaking to anyone on that number, but he did not.*

*I am satisfied that through no fault of his own, Mr M has told us everything that he can.*

*I asked Metro specifically about the individual transactions for over £5,000 each and why it was comfortable with that level of spending, given it was reaching over £13,600 in an hour which was significantly out of character for B. Metro said it did not have records to say exactly why these transactions were approved now given the amount of time that has passed since they were made. It suspected it would have been because of the positive response to the text message earlier in the evening.*

*What I've provisionally 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.*

*When considering what is fair and reasonable, I am required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where appropriate, what I consider to have been good industry practice at the relevant time. In cases when there is a dispute about what happened, I base my decision on the balance of probabilities. In other words, what I consider is most likely to have happened in the light of the available evidence.*

*Of particular importance to my decision about what is fair and reasonable in the circumstances of this complaint, are the Payment Services Regulations 2017 (the PSR 2017) which apply to transactions like the ones B disputes.*

*Among other things the PSR 2017 includes the following:*

*Regulation 67 of the PSR 2017 explains:*

*67.—(1) A payment transaction is to be regarded as having been authorised by the payer for the purposes of this Part only if the payer has given its consent to— (a) the execution of the payment transaction; or (b) the execution of a series of payment transactions of which that payment transaction forms part.*

*Whether a payment transaction has been authorised or not is important because account holders will usually be liable for payments they've authorised and, generally speaking, banks will be liable for unauthorised payments.*

*If Mr M made the disputed transactions himself or authorised for them to be made on B's behalf, it would not be fair to ask Metro to refund them. But Mr M says he was not involved in the payments in dispute. So the key question for me to consider is whether Metro has provide enough evidence to hold B responsible.*

*Metro can only refuse to refund unauthorised payments if it can prove Mr M authorised the transactions on B's behalf, but Metro cannot say that the use of the card and PIN issued to B conclusively proves that the payments were authorised. This is in line with the FCA's position, as outlined in its document setting out its role under the Payment Services Regulations 2017.*

*The FCA says:*

*To avoid doubt, it is not sufficient for the PSP to assert that the customer "must have" divulged the personalised security features of the payment instrument, and to effectively require the customer to prove that he did not. The burden of proof lies with the PSP and if a claim that a transaction is unauthorised is rejected, the rejection must be supported by sufficient evidence to prove that the customer is guilty of fraud, gross negligence or intentional breach and the reason for the rejection must be explained to the customer.*

*Unless Metro can show that consent has been given, it has no authority to make the payment or to debit B's account and any such transaction must be regarded as unauthorised.*

*To start with, I have seen the bank's technical evidence for the disputed transactions. It shows that the transactions were authenticated using the payment tools issued to B.*

*In summary, Metro says that it can hold B responsible for the transactions because there is no explanation as to how a third party could have known the card's PIN. It says that only Mr M could have responded to the verification text message because his device uses facial recognition. It considers the regular spacing of the transactions is consistent with an evening out. It also points to inconsistencies in Mr M's recollections.*

*But from what I have seen, I don't think Metro has enough to fairly justify its decision to hold B liable for the transactions in dispute.*

*It is not my role to identify and then obtain the evidence to support a particular theory about what might have happened. But from the evidence that is available for me to consider in this*

case, the bank's explanation that Mr M has authorised the spending is no more likely than the Investigator's overall position that he did not.

*I accept that this is a finely balanced case. Both parties have theories about what could have happened. But I don't consider the available evidence sufficiently supports the position that Mr M most likely authorised the disputed transactions himself.*

*Metro has challenged how a third party could have obtained the card and PIN to be able to make the transactions. It said it was unclear when the debit card left Mr M's possession and suggested it could have been taken from him in the bar, or that he might have been mugged after leaving the bar or that he lost the card somewhere. But it seems unlikely to me that an opportunistic mugger or someone that found the card randomly would then go on to use it in the exact same venue where Mr M had just legitimately purchased a drink. This suggests to me that Mr M probably became separated from the card whilst at the bar. The technical evidence for the transactions shows the correct PIN was entered, which suggests that whoever was using the card must have known what it was. There is no debate that Mr M purchased one drink in the venue and used his card and PIN to pay for it.*

*The next transaction happened around 21 minutes later. There is theoretically the opportunity for Mr M's PIN to have been observed and the card taken from his possession. There has been a lot of focus placed on the text message Metro sent to Mr M's registered phone number in order to verify the spending. Metro's position is that only Mr M could have responded positively to this so he must have authorised the transactions.*

*I appreciate the Investigator's position that fraudsters could have held Mr M's phone to his face to activate the facial recognition software to be able to unlock it is an assumption. But Metro's position that it was Mr M that unlocked his device and responded positively is an assumption too. I have not seen anything to conclusively show that the text message that was sent back to the bank to confirm the spending was sent after Mr M's involvement. Based on what I have to consider, it is just as likely that the text message could have been responded to directly from the locked screen without Mr M's knowledge or involvement. I don't think the fact that the text message was responded to positively is enough, in and of itself, to say that Mr M authorised the transactions.*

*Metro has also suggested that the regular spacing of the transactions is in line with a genuine evening out. It has pointed out that this type of venue can be very expensive. I do not dispute that, and I agree that it is possible for customers to spend rather more than they had realised or anticipated as part of a genuine night out at this type of establishment. It is also possible that this type of venue can trick or extort money out of patrons, something Metro acknowledged when Mr M first reported what had happened. Fraud patterns change regularly so I don't think Metro can read anything either way into how the pattern of spending appears.*

*But even allowing for the possibility that Mr M was genuinely at the venue for a night out that got out of hand, I think it would be a stretch for him to have legitimately spent over £20,000 in the course of the evening as described, especially being mindful that the legitimate purchase he made was for £7.95. Mr M was alone and not part of a group. By his own recollections, his intention had been to return to his hotel and rest before taking an early flight back to the UK the next morning. He was not on a big night out and there is no suggestion that things were developing in this direction.*

*Metro has also pointed to previous decisions made by this service where we've concluded that an account holder being intoxicated or drugged does not invalidate consent to payment transactions. It suggests that these transactions could have happened because of excessive but voluntary consumption of alcohol. I accept there are occasions where people spend*

more than they typically would if they are out and having a good time. But the wider circumstances of this particular complaint don't point to Mr M having excessively consumed alcohol before he went into the bar or whilst inside. He has described in some detail his hearty evening meal and his timings for being in the restaurant and going to the bar are consistent, tallying with the bank's technical evidence for the timings of the associated card payments. It is unlikely Mr M would have become so intoxicated from one lager drink in the bar that he would have no knowledge or awareness of his surroundings or what was happening for a period of around 7 hours. I have not seen any evidence that conclusively shows that Mr M was involved in the transactions or that he benefitted from them in any way. It is just as likely that the transactions happened because B's card and PIN were stolen from Mr M.

Neither party is sure exactly what bar Mr M was in and whether the two merchants are the same place or not. When Mr M spoke to the bank's fraud investigator, there was speculation as to what venue Mr M may have been in based on a search of the digital map of the area close to the restaurant where Mr M had dinner. If this is the place where Mr M was, it is unclear why that venue would have been serving him past its advertised closing time of 5am.

Metro has also pointed out that Mr M's recollections have been inconsistent. It highlights that he has said he has no memory and says he would not have made these transactions but has also said that he has no memory of contacting the Polish Police but says that he did. I have not seen any evidence to show that the Polish Police were contacted specifically by Mr M. He has provided a screenshot of his phone that shows he tried to call 911 at 7:29am. It is possible that Mr M was aware enough to know that he needed help and tried to dial a number that he thought could be of assistance to him whilst abroad, but it is also possible that a bystander alerted authorities upon seeing Mr M unconscious and injured. I don't think it is fair of Metro to read too much into this perceived inconsistency given the extent of Mr M's injuries. His testimony to both the bank and this service has been consistent and as clear as he is able to give in the wider circumstances.

When I weigh everything up, I am not as sure as I would need to be that Mr M made the transactions or that by his actions he authorised someone else to make them on B's behalf. His explanation of what happened and his behaviour in discovering and reporting the transactions is consistent with Mr M not consenting to them. I am also not persuaded that the transactions happened because Mr M acted with gross negligence. As I have explained, it is for Metro to show that Mr M authorised these payments and not for Mr M to show that he did not.

In addition, I am not persuaded that it was reasonable for Metro to allow increasingly large payments to go through without taking further steps to ensure B wasn't at risk from financial harm. Although Metro had identified earlier activity as suspicious and had placed a block on the card at that point, it is not unreasonable to expect a bank's fraud alerts to respond proportionately to the ongoing risk of fraud or financial harm.

Metro had identified risk factors following a payment of £645.89. It blocked an attempted payment of £647.78. Then after receiving a positive response to a verification text message, it allowed a transaction of £512.82 to be processed and didn't challenge any further spending. It is unclear why a merchant would accept payment for a lesser amount given that the previous attempt of £647.78 had been blocked. The pattern of the transactions looks increasingly odd. A spending pattern which is clearly concerning notwithstanding the positive text message response is developing. Transactions for over £5,000 at a time are being processed, which is a considerable amount of money for anyone to spend in one go and not consistent with what Metro knows about how B's accounts usually ran. There is over £13,500 of spending that takes place in an hour. I consider that Metro ought to have done more than it did and taken further action in response to this later activity, which looks



*particularly suspicious. The transactions are for differing and rising amounts which looks deliberate. It seems unlikely that Mr M could have spent this much money on drinks given the cost of the legitimate drink he purchased was a mere £7.95. I think it is likely that further intervention from the bank would have prevented some of B's loss.*

*I'm also mindful that Metro didn't approach the venues in question to verify what was purchased at the time. I appreciate the bank had no grounds to chargeback the transactions as fraud because they were completed using the genuine card along with additional authentication. But it was still open to them to have raised a merchant dispute about what was bought. A substantial amount of money was spent that evening and I'd expect genuine merchants to be able to provide some detail to clarify what the money was for. By not doing so, potentially valuable evidence doesn't exist for me to consider.*

*There's no doubt that Mr M has been caused worry and concern as a result of this matter. He's pointed out the bank's initial investigation took a long time. That is not surprising given the complexity of this case. But this is a large amount of money for Mr M's fairly young business to have lost, made worse by the increased financial strain on B as a result of the global pandemic. But as a limited company isn't a natural person, I am unable to award compensation for Mr M's personal distress, pain and suffering even though Mr M has experienced this impact as a result of Metro's actions.*

#### *Overall*

*Having considered all the evidence and on balance, I don't currently believe there's enough to show Mr M authorised these transactions. I am not currently persuaded that it is fair and reasonable to Metro to hold B liable for these disputed payments.*

*Under the Payment Services Regulations, Metro may make its customer liable for losses up to a maximum of £35 resulting from unauthorised transactions from the use of a lost or stolen payment instrument. This does, however, not apply if it was not possible for the customer to detect the loss, theft or misappropriation before the payment was made (unless the customer acted fraudulently). There is no mention of this in the terms and conditions that apply to B's account, so I shall assume that Metro will not be choosing to deduct the first £35 of any refund for this claim. If it considers it has the right to do this, it should let me know as part of its response to this provisional decision*

#### *My provisional decision*

*For the reasons I've given, my provisional decision is to instruct Metro Bank PLC to:*

- Refund all debit card transactions made between 23:37 on 23 January 2020 and 05:47 on 24 January 2020 totalling £20,124.20*
- Add 8% simple interest a year to those transactions from the date they debited B's account until the date of settlement.*

*In my provisional decision I asked both parties to send me any further evidence or arguments that they wanted me to consider.*

*Metro acknowledged that it had received my provisional decision but had nothing further to add. It said it would await the final decision.*

*Mr M responded on B's behalf and said there were no final points that he wished to raise. He explained he was keen to finally close this distressing matter.*

## **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.

As neither party has provided any further information for me to consider, I see no reason to depart from the conclusion reached in my provisional decision, which is summarised above and forms part of this final decision. It sets out my reasons in full.

## **My final decision**

My final decision is that I uphold this complaint. To settle it, Metro Bank PLC should now:

- Refund all debit card transactions made between 23:37 on 23 January 2020 and 05:47 on 24 January 2020 totalling £20,124.20
- Add 8% simple interest a year to those transactions from the date they debited B's account until the date of settlement.

If Metro considers it is required by HM Revenue & Customs to take off income tax from the interest, it should tell B how much it's taken off. It should also give B a certificate showing this if it asks for one, so that B can reclaim the tax from HM Revenue & Customs if appropriate.

Mr M should refer back to Metro if he is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask B to accept or reject my decision before 21 April 2022.

Claire Marsh  
**Ombudsman**