

The complaint

Ms A complains that NewDay Ltd won't refund payments she didn't make from her credit card account.

What happened

Ms A says that she ordered an item online in June 2020. This was for a sterling equivalent amount of £93.28 with a £2.75 fee on her credit card. She was then contacted by the merchant which said it couldn't deliver it before she was due to go abroad. Ms A says that it agreed to make a refund. She was abroad from July 2020 until May 2021. When she returned she noticed that this payment hadn't been refunded. And that three further ones to this merchant had been debited to her account in July 2020 (£93.50 plus £2.76 fee); August 2020 (£89.67 plus £2.65 fee); and September 2020 (£90.96 plus £2.68 fee). The amount had been the same each time in US dollars and then converted to sterling on her account. Ms A says she didn't receive any goods.

NewDay said that it couldn't dispute these payments. There was a time limit of 120 days to make a chargeback claim and this had passed for each of the payments. It said that the payments had been made under a continuous payment authority. And its only way of disputing them was through the chargeback scheme.

Our investigator agreed that it was now too late to raise a chargeback. The rules of the scheme were set by the card issuer and not NewDay. And there was no realistic prospect of this succeeding. He appreciated that Ms A had explained she was out of the country but that this didn't alter the position.

He considered based on what Ms A had said that she authorised the first payment. But Ms A said she didn't agree to the further payments and he thought that was consistent with her phone call to NewDay when she reported this. And that this should be assessed taking into account the Payment Services Regulations 2017. The claim had been made within 13 months of the payments. And the issue was whether Ms A had consented to the payments through the continuous payment authority that NewDay said had been established.

He had looked at the merchant's website. It offered single order products as well as those on subscription. He said he took into account guidance about continuous payment authorities endorsed by the Financial Conduct Authority. This set out that a merchant needed to obtain positive consent for a continuous payment authority. He wasn't persuaded that it had been established that the merchant had received Ms A's informed and positive agreement to a continuous payment authority. And it wouldn't have made sense for her to arrange for regular deliveries when she was out of the country. So NewDay hadn't demonstrated that she had authorised the payments. He said that these were distance contracts. But these weren't excepted contracts where under certain circumstances a consumer could become liable for unauthorised payments.

So our investigator said that the three payments in July, August and September 2020 should be refunded with fees and interest, that any adverse credit information as a result of these payments be removed and that eight per cent interest paid on the any credit balance once

the account had been reworked. NewDay could deduct £35 from the claim in line with the Payment Services Regulations if that was provided for in the terms and conditions of the account.

NewDay didn't agree. It said that this wasn't a fraud case and so was a merchant dispute. There were no other options for it to pursue. It asked that the complaint be referred to an ombudsman.

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 agree with our investigator that there was no possibility of a chargeback as the dispute about these payments wasn't raised within 120 days of any of them. Ms A says she didn't get a refund for the first payment. She doesn't dispute she authorised this payment even if she later expected a refund. But she says that she didn't agree to a continuous payment authority on the account. So, there are grounds in my view to consider whether she authorised those three further payments.

I need to take into account the Payment Services Regulations 2017 in considering this complaint. These state that a payment can only be authorised if it was consented to. So, it's not enough for it to be authenticated, say with card details. And if they weren't authorised Ms A wouldn't generally be responsible for them.

NewDay has provided information about the further payments . And taking into account the monthly frequency and how these were processed I consider that a continuous payment authority had been used. The merchant appears to have tried to take the payment after September 2020, but these were declined by NewDay for other reasons. I'm satisfied that the payments applied were authenticated. The issue is whether the nature of them was clear to Ms A when she made the initial purchase.

I've looked at the screenshots of the merchant's website pages which our investigator shared with NewDay. There were options to make a one-off purchase or a subscription. But if the subscription option is chosen it doesn't clarify at checkout that this is going to be for more than one transaction. I appreciate NewDay's difficulty in obtaining details about how this was presented to Ms A after the time limits for chargeback had expired. But it hasn't been able to show that Ms A positively agreed to the continuous payment authority.

Payments on her credit card statement show she was abroad from July 2020. And I accept as Ms A says that it wouldn't have made sense for her to arrange for monthly deliveries to her home. While Ms A could have arranged to view her NewDay account online she had a direct debit established to take the required monthly repayments. Taking everything into account I'm not satisfied on the evidence that it is most likely Ms A authorised the disputed payments that were applied to her account in July, August, and September 2020.

I agree with our investigator's suggested resolution of the complaint noting that these weren't excepted payments.

My final decision

My decision is that I uphold this complaint and I require NewDay Ltd to:

- 1) Refund the three disputed payments with associated foreign exchange fees. If provided for in the terms and conditions of the account NewDay may deduct a maximum of £35 from the claim.
- 2) Refund any interest or charges incurred as a result of these payments.
- 3) Amend any adverse information reported to credit reference agencies as a result of these payments
- 4) Rework the account and pay eight per cent per annum simple interest for any period from July 2020 to the date of settlement when the account would have had a credit balance as a result.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms A to accept or reject my decision before 4 February 2022.

Michael Crewe
Ombudsman