

The complaint

Mr G and Mrs G complain that HSBC UK Bank Plc trading as First Direct haven't refunded money they lost as a result of a scam.

Mrs G is the lead complainant to this service, so I'll refer to her throughout the decision.

What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide a brief overview of some of the key events here.

In November 2018 Mrs G was looking into investment opportunities to help get her daughter a property. She was browsing social media when she came across an investment advertisement with a merchant, I'll refer to as 'A', which was endorsed by well-known celebrities. Due to the status of the celebrities she saw no reason to think it was a scam.

From November 2018 to September 2019 Mrs G then sent a total amount of around £16,000 (including fees) via her debit card to A. Mrs G did receive one credit from A for around £414 including fees. After losing her money she contacted the police and then First Direct to see if it could return her money.

First Direct considered the claim but said it couldn't raise a chargeback for the payments unless Mrs G provided more information that showed she had attempted to withdraw her remaining funds and the available balance at the time the request was made.

Mrs G then brought her complaint to this service. She said the payments were out of character for her account, so she thought First Direct should've done more here.

Our investigator felt the complaint should be upheld. She said Mrs G didn't have the necessary evidence to raise a successful chargeback. But she said that First Direct's system notes show there was a fraud detection in November 2018 when the first payment to A was made and Mrs G was asked to call First Direct to release it. After listening to that call, the investigator said First Direct should've done more to warn Mrs G about fraud and scams, and if it had, she wouldn't have continued with the transaction and the scam would've been prevented.

First Direct disagreed and asked for an Ombudsman's review. It said its automated system generated a call to see if the transaction was genuine and that the bank can't be considered investment advisors. It said there was no FCA warning about A at the time and Mrs G failed to undertake due diligence before sending the payment.

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 going to uphold this complaint.

I've read and considered the whole file. But I'll concentrate my comments on what I think is relevant. If I don't mention any specific point, it's not because I've failed to take it on board and think about it, but because I don't think I need to comment on it to reach what I think is a fair and reasonable outcome.

It is common ground that Mrs G authorised the scam payments of around £16,000. I accept that these were authorised payments even though Mrs G was the victim of a scam. So, although it wasn't her intention to pay money to the scammers, under the relevant regulations and the terms of her account, Mrs G is presumed liable for the loss in the first instance.

However, taking into account the law, regulatory rules and guidance, relevant codes of practice and good industry practice, there are circumstances where it might be appropriate for First Direct to take additional steps or make additional checks before processing a payment in order to help protect customers from the possibility of financial harm from fraud.

Chargeback

The investigator has already set out what criteria is needed to attempt a chargeback, so I won't repeat that here. But essentially, the chargeback process is voluntary and run by the card scheme whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed or be deemed a 'valid claim'. Our role in such cases is not to second-guess the card scheme rules, but to determine whether the regulated card issuer (i.e. First Direct) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of Mrs G.

In order for chargeback claims to succeed, very specific evidence of Mrs G's available balance and that a withdrawal of an available balance had been attempted the same day would have been required. But Mrs G didn't have this evidence, so she didn't meet this criteria.

So, I can't say First Direct treated Mrs G unfairly by not raising a chargeback here.

Should First Direct have done more to warn Mrs G when she made the payments

Here First Direct considered the first payment sufficiently unusual to block her card and asked Mrs G to call it before releasing the block. So, I've gone on to consider whether First Direct did enough to ask Mrs G about why she was making the payments and whether it should've provided a clear fraud and scams warning.

First Direct says it doesn't provide investment advice and Mrs G willingly made the payments, so it didn't treat Mrs G unfairly by not providing a clear fraud and scams warning.

I've listened to the call Mrs G had with First Direct. It explained to her on the very short call that it was checking it was her making the payment and confirmed the amount she was trying to send. There were no further questions about the payment or why Mrs G was making it. When Mrs G asked if First Direct needed anything else from her she was told no.

I understand that under the Payments Services Regulations First Direct is required to process payments which have been authorised as swiftly as possible. But I don't agree this means it shouldn't ask probing questions about why the payment is being sent and give clear fraud warnings to its customers, if a potential fraud or scam is suspected.

Here Mrs G saw an advert on-line endorsed by various celebrities with one of those celebrities taking legal action against a social media platform in April 2018 (before this scam started). So, if First Direct had asked a few probing questions about why the payment was being made and how Mrs G had come across A, I'm satisfied she would've mentioned the celebrities and the advert on social media. And I think it's reasonable for someone at First Direct, checking potential fraudulent transactions, to be aware that this was a common type of scam.

So, I think all the above information should've been enough for First Direct to provide a clear scam warning and that what Mrs G was doing sounded like a typical scam the bank would've been aware of. And it should've invited Mrs G to go and check that A was actually regulated as required at the time by the FCA.

Causation

I'm satisfied that if First Direct had provided a fraud and scams warning to Mrs G, along the lines I've set out above, she wouldn't have continued with the scam. Mrs G was investing the money to help her daughter and made the payments because one of the celebrities was regularly on the television and internet providing advice about 'money matters'. So, I'm satisfied, a clear warning about celebrity backed investments likely being a scam and asking her to check whether A was regulated would've more than likely stopped her from continuing here.

Contributory negligence

In this case, I don't think that Mrs G was to blame for what happened. That is, she did not foresee the risk of this sort of harm or any harm. I don't think Mrs G could've foreseen the risk that the company she was dealing with was a scam as she had no investment experience. And scammers are often well versed in persuading customers such as Mrs G to invest in what they think is a legitimate company through the use of persuasive language. And whilst in hindsight it might seem easier to identify such a scam, I don't think at the time Mrs G acted unreasonably here. Therefore, in the circumstances, I do not think it would be fair to reduce compensation on the basis that Mrs G should share blame for what happened.

Putting things right

I believe First Direct should refund Mrs G all the stolen payments totalling £16,005 which includes the transaction fees and the credit Mrs G received. As this was a current account, First Direct should add interest to that sum (less any tax properly deductible) at 8% simple interest per year from the respective dates of loss to the date of the refund.

My final decision

For the reasons set out above, I'm upholding this complaint. HSBC UK Bank Plc trading as First Direct should pay Mr G and Mrs G the amount I've outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G and Mrs G to accept or reject my decision before 1 September 2022.

Mark Dobson
Ombudsman