

The complaint

Mr P complains that Sainsbury's Bank Plc failed to refund a transaction he didn't recognise and left him without the use of his account.

What happened

Mr P noticed a withdrawal had been made from an Automated Teller Machine (ATM) that he didn't recognise and contacted Sainsbury's about it. Mr P explained that he hadn't made this withdrawal and it was out of character for him to take this amount of money from an ATM.

The withdrawal took all the available funds from the account. He said that he generally uses ATM's close to where he lives and the unrecognised withdrawal was in another part of the city that he doesn't visit.

Mr P said that he still had his card and hadn't given it or his Personal Identification Number (PIN) to anyone else to use. He'd transferred funds from another account to use for a shopping trip, which was postponed. Mr P explained that he was considered in the vulnerable category during the pandemic and hadn't ventured far from his home. He'd used his local ATM four days prior to the disputed transaction.

Sainsbury's looked into the matter and because the ATM didn't belong to them, they asked another business, who I'll refer to as M, to give them the audit information about the transaction.

M told Sainsbury's that they'd checked the information from the withdrawal and Mr P's card was used, along with the correct PIN. M also said that a balance enquiry was made before the withdrawal and there were no incorrect PIN attempts. M confirmed that there hadn't been any reports of card's been copied or cloned with this ATM or the usual ones used by Mr P. Sainsbury's cancelled Mr P's card and attempted to re-issue it, which suffered a delay and Mr P waited for several weeks before he received his new card, having to remind Sainsbury's on occasion that he was still without his card.

Sainsbury's told Mr P they were declining to refund him the disputed transaction. This was because they believed his genuine card was used with the correct PIN and they couldn't identify any point where his card could have been compromised. Mr P complained to Sainsbury's who didn't change their position, although they recognised they'd let Mr P down with the delay in issuing his new debit card and offered £50 compensation.

Mr P was unhappy with how his complaint had been handled and brought it to our service for an independent review where it was looked into by one of our investigators. He asked for more detailed audit information about the transaction and whether the "chip" on the card was actually read by the ATM - which Sainsbury's later said they couldn't supply. Based on the available evidence, our investigator didn't uphold Mr P's complaint because he thought it was unlikely anyone else could have used Mr P's genuine card. He also thought that the gap between the last time Mr P used his card and the disputed transaction wasn't supportive of how cloned cards were usually used. He also thought the compensation paid for the delay issuing the new card was reasonable.

Mr P disagreed with the investigators outcome and asked more questions about the Chip on the card and the ATM that was used to withdraw his money. Mr P gave more background to his normal use of the card and had noted that someone was “uncomfortably close” to him when he used his normal ATM and thought this was when he’d last used his card. Mr P also thought that it was possible his card was copied or cloned. He didn’t think that the gap between withdrawals was evidence that his card wasn’t cloned because criminal gangs also had to deal with delays caused by the pandemic.

Mr P asked for a further review of his complaint which has been passed to me for a decision. Sainsbury’s were asked for further audit information about both the card and the withdrawal. They were unable to supply anything further and M haven’t responded to additional requests we made about the withdrawal. Sainsbury’s did confirm that the card issued to Mr P wasn’t fitted with a Chip.

I issued a provisional decision where I said:

I’ve considered all the available evidence and arguments to decide what’s fair and reasonable in the circumstances of this complaint.

The relevant law surrounding authorisations are the Payment Service Regulations 2017. The basic position is that Sainsbury’s can hold Mr P liable for the disputed payments if the evidence suggests that it’s more likely than not that he made them or authorised them.

Coming to the question of authorisation, this is made up of two parts. Authentication and consent. Authentication is usually referred to as the technical evidence and in this case, Sainsbury’s have supplied evidence from M that shows the disputed withdrawal was made from Mr P’s account. Sainsbury’s have explained that the withdrawal could only happen with the correct PIN being used with a card linked to Mr P’s account. I’d normally expect to see far greater detail about the operation of an ATM and how the card was used. In this complaint I’ve not had opportunity to examine it and I’ve had to rely on the notes taken during a phone call between Sainsbury’s and M. I’ve no reason to doubt the recording of the notes of the call, but they are far from a comprehensive account of what happened when the money was withdrawn. But, they do provide the very basics of what happened, which is that a card linked to Mr P’s account was used with its correct PIN to withdraw funds. On balance, I’m satisfied that the evidence shows the disputed transaction was authenticated.

Consent refers to the way in which Sainsbury’s and Mr P agreed to use the card for transactions. For example, when using the card and PIN together, Sainsbury’s agree to accept that this is a legitimate payment instruction made by the cardholder or another approved user and make the payment on their behalf. The transactions in this case used the card and the correct PIN, so I’m satisfied that consent was given and the disputed transactions were authorised. But, there are exceptions where it wouldn’t be appropriate for Sainsbury’s to hold Mr P responsible, for example if the card was used without his permission.

In their final response letter to Mr P, Sainsbury’s said that because Mr P’s original card and PIN were used, they couldn’t refund the transaction. Sainsbury’s later informed our service that they couldn’t supply any information about the Chip on the card. Many modern cards have a Chip embedded in them which enables the ATM to identify that the card was the genuine card issued to the account holder. Sainsbury’s later told our service that the card issued to Mr P wasn’t fitted with a Chip, so it’s not possible to determine if the card that was used to make the withdrawal was the original card – despite what Sainsbury’s claimed in their final response to Mr P.

The type of card issued to Mr P used the magnetic strip as part of its security and these are able to be copied or cloned. So, I've thought whether this was the cause of the withdrawal. What is evident to me is that the correct PIN was used in the ATM – whether that was in a copied card or not. In order for an unauthorised third party to make the withdrawal, they would need to obtain the PIN. Mr P's personal arrangements are such that it's unlikely an unauthorised third party could have obtained the PIN from his home and the only plausible scenario is that the PIN could have been obtained when he last used his card.

This was made at one of Mr P's normal ATMs and took place four days prior to the disputed withdrawal. Mr P had transferred funds into the account some days earlier, which was the usual way he used this account. Mr P has stated that he was aware of someone uncomfortably close to him during a recent withdrawal and he thinks it was the last time he used his card. So, it's possible that Mr P's PIN was obtained at that point.

In order for the disputed withdrawal to take place, Mr P's genuine card or a cloned card would be needed. Mr P still had his card when he noticed the withdrawal, so it's unlikely an unauthorised third party was able to obtain Mr P's genuine card, use it and replace it without Mr P noticing. It's possible that the card was cloned the last time he used it – and this is usually done by a device that's been attached to the ATM that captures the information from the card. A common feature of this type of crime is that it relies on a large number of cards to be cloned.

M confirmed to Sainsbury's that there were no reports of any suspicious activity at any of the machines used by Mr P. If a cloned card was responsible for the withdrawal, I would expect that numerous complaints from other users would have been recorded. In such cases, M would most likely have been able to identify the common ATM used to capture the card details – such as the ones usually used by Mr P – but that wasn't the case here.

I recognise the unusual nature of the withdrawal – that it was in a different location and time of day to Mr P's usual withdrawals. The disputed withdrawal also emptied the account. Mr P said this withdrawal was an unusual amount for him and Sainsbury's argued that Mr P had withdrawn a similar amount before. Looking at Mr P's recent withdrawals, I would say this was slightly higher than normal, but I don't think the actual amount is relevant here – it's the fact that all the available money was taken which isn't how Mr P normally operated his account.

This is a finely balanced complaint and there's evidence from both parties that supports their relative positions. My decision has to be made based on an objective review of the evidence. Where the information I've got is incomplete, unclear or contradictory, as some of it is here, I must make my decision based on the balance of probabilities, in other words, on what I consider is most likely to have happened in light of the available evidence.

In summary, funds were withdrawn from an ATM using Mr P's account. That ATM was in an unusual location and was made at an unusual time compared to the normal use by Mr P. The account was also emptied. It's possible the PIN was compromised during the last legitimate use by Mr P, but there's no evidence that any of the ATMs associated with this complaint were connected to any suspicious activity – including the cloning of other ATM cards. It's this final point that persuades me that I can't uphold this complaint because the cloning of cards would likely produce more than one complaint which isn't the case here. I can't conclude it wasn't authorised without stronger evidence to the contrary. That means I think it's more likely than not that Mr P carried out these transactions himself – or that someone else with consent did so.

Card Renewal

When Sainsbury's blocked Mr P's card, they told him they'd reissue it with a new PIN. This didn't happen for several weeks despite Mr P reminding them about it. Sainsbury's had experienced a problem with sending out new cards and they thought this was the reason for the delay. It took about two months for Mr P to receive his new card. In the meantime, he wanted to use funds from his account but couldn't because he didn't yet have a new card. Sainsbury's explained to Mr P that he could set up a new payee online, but as he didn't have the means to receive the security codes, he was unable to. Sainsbury's then assisted Mr P with how to access his money through their telephone banking service.

They recognised that they'd let Mr P down and credited his account with £50. I think the delay was overly long to replace Mr P's card. I don't think the £50 sufficiently compensates Mr P for the inconvenience he suffered as a result of the delay in receiving his card. He had to contact Sainsbury's on several occasions to gain access to his funds, which I think was unnecessary.

Sainsbury's could have provided better service to Mr P and confirmed that he'd received his new card, particularly when they knew there was an ongoing incident involving the issue of new cards. I intend to instruct Sainsbury's to make an additional payment to Mr P of £100 for the delay in sending the new card out.

I invited Mr P and Sainsbury's to give me any more evidence and information they wanted me to consider before issuing my final decision. Sainsbury's didn't respond and Mr P commented that:

- He hadn't been to that specific location and only rarely visited the general area.
- There would be records of Mr P travelling to the area.
- Mr P didn't believe that copying a magnetic strip would be part of a large criminal undertaking.
- It's possible the PIN would be obtainable from the magnetic strip.
- Mr P accepted my outcome regarding the card renewal aspect of his complaint.

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 see no reason to reach a different conclusion. But, I'll address the points that Mr P raised:

- *Mr P said he hadn't been to that specific location and only rarely visited the general area. Also, that there would be records of Mr P travelling to the area.*

I appreciate Mr P's point here that he hadn't been to that location, but the authorisation of a card payment doesn't rely on him carrying out the withdrawals himself. I can't say if it was Mr P or someone using the card with his permission, but consent will still have been given if someone carried out the withdrawal on his behalf or with his knowledge. It follows that the lack of evidence of travel wouldn't necessarily mean he didn't consent to the withdrawal. I'd note that there are other ways to travel to the location of the ATM without leaving a record as described by Mr P, such as a passenger in a vehicle – but I don't think that's relevant to whether consent was given.

- *Mr P didn't believe that copying a magnetic strip would be part of a large criminal undertaking.*

Mr P speculated that because cards with Chips couldn't be cloned, any criminal undertaking wouldn't need to be extensive if they were only targeting cards without Chips. Whilst the Chip can't be cloned (according to current understanding), those cards also have a magnetic strip, which is the target of such criminal activity. That's why this type of criminal undertaking is often associated with multiple complaints because they clone the magnetic strip on any card that uses the ATM whether they have a Chip or not. I've already made a finding about why I don't think the withdrawal was caused by a cloned card and I've seen nothing that would change my mind.

- *It's possible the PIN would be obtainable from the magnetic strip.*

I haven't seen exactly what Sainsbury's encode onto the magnetic strip, but it would be unusual to include the PIN because that would undermine the very security that the cards rely on. That being two factor authentication - because the card and PIN are separate. So, I don't think this was the likely cause of how the PIN was known to the user of the card.

I've not seen anything that would change my mind concerning the disputed transaction aspect of this complaint. Mr P accepted my outcome regarding the renewal of his cards, so this final decision confirms the findings set out in my provisional decision.

Putting things right

Sainsbury's are instructed to pay Mr P an additional £100 for the lack of service and delays caused by the renewal of his debit card. For the avoidance of any doubt, I do not uphold the complaint concerning the disputed transactions made from the ATM.

My final decision

I uphold this complaint in part against Sainsbury's Bank Plc and instruct them to pay Mr P an additional £100 for the poor service and delays he suffered as a result of the renewal of his debit card. I do not uphold the complaint concerning the disputed transactions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 8 April 2022.

David Perry
Ombudsman