

## Complaint

Mr S is unhappy that TSB Bank plc (“TSB”) closed his current account and then registered a fraud prevention marker against him. He’s also unhappy that TSB retained a final payment from his employer.

## Background

In August 2021, Mr S received a payment of £2,000.00 into his account. £200 was immediately withdrawn at a cash machine. Mr S then transferred the remainder of the funds to other accounts in his name.

TSB subsequently received a notification from the third-party bank, responsible for sending the £2,000.00 payment to Mr S’ account, stating that the payee of the funds had reported being a victim of fraud. TSB reviewed Mr S’ account and as a result of its investigation, it decided to close Mr S’ account and record a fraud prevention marker.

Mr S complained about TSB closing his account and also recording a fraud prevention marker. TSB looked at Mr S’ complaint and didn’t uphold it. As Mr S remained dissatisfied he referred the matter to our service.

One of our adjudicators looked into Mr S’ concerns. He didn’t think that TSB had done anything wrong or treated Mr S unfairly and so didn’t recommend the complaint be upheld. Mr S disagreed and so the complaint was passed to an ombudsman for a final decision.

## My findings

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

Having carefully considered everything, I’ve decided to partially uphold Mr S’ complaint. I’ll explain why in a little more detail.

### *Fraud marker*

I’ve started by looking at the concerns Mr S has about the fraud marker TSB recorded against him. The marker that TSB has filed is intended to record that there’s been a ‘misuse of facility’ – relating to using the account to receive fraudulent funds. In order to file such a marker, it isn’t required to prove beyond reasonable doubt that Mr S is guilty of fraud or a financial crime, but it must show that there are grounds for more than mere suspicion or concern. The relevant guidance says:

- *“There must be reasonable grounds to believe that an identified fraud or financial crime has been committed or attempted; [and]*
- *The evidence must be clear, relevant and rigorous such that the member could confidently report the conduct of the subject to the police.”*

What this means in practice is that TSB must first be able to show that fraudulent funds entered Mr S' account, whether they were retained or merely passed through. Secondly, TSB also needs to have strong evidence to show that Mr S was deliberately dishonest in receiving the fraudulent payment and knew it was, or might be, an illegitimate payment. This can include Mr S allowing someone else to use his account in order to receive an illegitimate payment. But a marker shouldn't be registered against someone who was unwitting; there should be enough evidence to show complicity.

To meet the standard of proof required to register a fraud marker, the bank must carry out checks of sufficient depth and retain records of these checks. This should include giving the account holder the opportunity to explain the activity on their account in order to understand their level of knowledge and intention.

In order to determine Mr S' complaint, I need to decide whether I think TSB had enough evidence to show fraudulent funds entered Mr S' account and that his actions suggest he was complicit in this. And having considered everything, I find that TSB did have enough to record a fraud prevention marker here. I'd like to explain why in a little more detail.

There doesn't appear to be any dispute that the funds in question, which entered Mr S' account in August 2021, did so as a result of fraudulent activity. So the only matter which remains in dispute here is whether Mr S was complicit in allowing his account to receive these illegitimate payments.

Mr S told TSB that the funds were sent to him by his cousin. He said his cousin told him he wanted to buy a car but couldn't withdraw the amount needed in one go. Mr S went on to say that he was going to withdraw the funds from another account which would allow him to withdraw them in one go. He was asked whether he had the registration of the car that was being bought but Mr S said he would need to check this with his cousin. During this call TSB told Mr S would be closing his account with immediate effect. Mr S responded saying his cousin was never supposed to send the funds to his TSB account but the account he was able to withdraw funds in one go from. And when he subsequently called to register his complaint he asked whether a fraud marker would be recorded against him.

When questioned by our adjudicator, Mr S said his cousin's girlfriend was the one who sent the funds to him for a car. He never questioned the payment because she was sending it on behalf of a family member. When our adjudicator asked why Mr S' cousin simply didn't get his girlfriend to withdraw the funds for him, Mr S said that this was because his cousin didn't want to travel across London to pick up the funds. Finally, when our adjudicator asked why some of the funds were withdrawn from his TSB account and the rest transferred to more than one account in Mr S' name, Mr S said that he was trying to save on charges that his other providers added for making withdrawals.

I've thought about what Mr S has said. But I'm afraid that what he's said simply isn't plausible. Instead the available evidence suggests that he was complicit in the fraud which took place. I'm concerned by the steps that were taken to reduce the amounts withdrawn from different accounts. Mr S says that he did this to minimise the charges he would have to pay for withdrawing these funds.

But he's also said that his cousin's girlfriend was never supposed to transfer the funds to this account and was instead supposed to transfer them all to the account which would have charged him for cash withdrawals. And even then as the fees charged would be a percentage of the total amount withdrawn, this doesn't explain why the transfers were made in smaller amounts, as the amount paid in charges would still be the same.

Furthermore, I'm also concerned that Mr S hasn't been able to provide anything at all to support his version of events or that he passed on the funds he withdrew to his cousin. It's clear from Mr S' initial discussion with TSB that he suspected this payment may have been responsible for his account being blocked. And as this is the case, I don't think that it is unreasonable for him to have kept anything he had.

I'm afraid the implausibility of what Mr S has told us coupled with him being unable to provide anything to corroborate his version of events mean that I can't reasonably conclude he was an unwitting participant here. And I'm satisfied that TSB was reasonably entitled to conclude it was more likely than not that M S was complicit in his account receiving fraudulent funds.

Overall and having considered everything, I'm satisfied that TSB did have sufficient evidence to show that fraudulent funds entered Mr S' account. As this is the case, I don't think that it was unfair for TSB to record a fraud prevention marker in the circumstances that it did.

#### *The closure of Mr S' account*

I now turn to the closure of Mr S' account. The terms and conditions of Mr S' account permitted TSB to close it with immediate effect where he was "*using a service or money illegally (or he was allowing someone else to do so)*". I've already explained why I think TSB was reasonably entitled to conclude that Mr S' account had been used for fraudulent purposes when explaining why it didn't act unfairly in recording the fraud prevention marker. As this is the case, I'm also satisfied that, for much the same reasons, the terms and conditions permitted TSB to close Mr S' account.

So overall I don't think that TSB acted unfairly towards Mr S when recording the fraud marker and closing his account and I'm not upholding these parts of his complaint. I appreciate this will be very disappointing for Mr S – especially in light of the ongoing impact he's said the fraud marker is having on him. But I hope he'll understand the reasons for my decision and that he'll at least feel his concerns have been listened to. Furthermore, Mr S might find that he's able to open an account with another bank as long as he applies for a Basic Bank Account, rather than a full Current Account or any such equivalent.

#### *The final credit into Mr S' account*

Mr S is also unhappy that TSB failed to return the final payment that his employer made into his account. I contacted TSB to ask whether it had realised that the credit for £92 paid into Mr S' account, on 1 September 2021, entitled '*August additional*' was from Mr S' employer and appeared to be related to his salary. TSB initially said that it wasn't aware that this credit was any sort of salary payment despite it being from Mr S' employer.

I then informed TSB that this payment was a salary payment and should be returned with interest at 8% simple per year. TSB then replied saying that it applies the First-in first-out rule (which is also known as Clayton's Rule and what I've referred to it as from here). And its application here means that even though a balance of £567.37 remained in Mr S' account when it was closed these were fraudulent funds (not Mr S' salary credit of £92) and Mr S wasn't entitled to any of this.

I've thought about what TSB has said. But I don't see how it can have applied the rule it says it has and reached this result here. At its core, Clayton's Rule presumes that the funds which are paid into an account first are the ones first paid out. Mr S' account had a balance of £654.33 at the time his salary credit of £92 came in on 1 September 2021.

It isn't in dispute that on £654.33 remaining in Mr S' account on 31 August 2021 were the remaining fraudulent funds. But the £92 salary credit entered after this and were the last funds to enter Mr S' account. This means that, under Clayton's Rule, the spending TSB has referred to came out of the £654.33 – not the £92 – as the £92 would be the last funds to exit Mr S' account because they were the last to enter. Clearly the spending referred to didn't exceed £654.33 as £567.37 remained at the time the account was closed.

So if TSB says Clayton's Rule applies here, which it clearly is, it follows that £92 of the £567.37 closing balance were Mr S' funds and only £475.37 remained of the fraudulent funds. As it is TSB that is arguing it normally applies Clayton's Rule and that it should also apply here, I'm satisfied that it needs to return £92 to Mr S. This means that I'm upholding this part of Mr S' complaint and TSB should pay Mr S £92 plus interest, at 8% per year simple, from the date the account was closed to the date it makes payment.

### **My final decision**

For the reasons I've explained, I'm partially upholding Mr S' complaint. TSB Bank plc needs to pay Mr S £92 plus interest, at 8% per year simple, from the date his account was closed to the date it makes payment.

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

Jeshen Narayanan  
**Ombudsman**