

The complaint

Mrs D complains about the way American Express Services Europe Limited (AESEL) handled her request for a refund in relation to a holiday she cancelled due to Covid-19. Mrs D used her credit card to make a deposit for the holiday.

What happened

In November 2019, Mrs D booked a package holiday for 2 to 18 April 2020, through a merchant who I'll refer to as "S". The total cost of the holiday for Mrs D was £4,486 and she used her AESEL credit card to make a deposit for the holiday. The invoice showed Mrs D made a deposit of £100 but her AESEL bank statement shows Mrs D was charged £103.54 - this was due to a non-sterling transaction fee. The rest of the cost of the holiday was paid by bank transfer to S. The holiday was for Mrs D, her husband and their friend. Mrs D says her friend paid for his part of the holiday himself and clarified that her complaint is in relation to the amount she spent for her and her husband.

On 17 March 2020, Mrs D emailed S and said she wanted to cancel the holiday – Mrs D said this was because the Foreign, Commonwealth and Development Office (FCDO) advised against all but essential international travel. Mrs D was sent a cancellation invoice by S on the same day. The invoice showed S were only willing to give Mrs D a partial refund rather than the full amount. S explained that Mrs D's booking was made up of three components:

- Hotel and land arrangements for the tour – S said they were only prepared to refund £1,482 of the total £2,279 cost. S said the hotels were agreeing to adjust the amount for Mrs D to be able to travel at a later date, they hadn't cancelled Mrs D's stay themselves.
- International flights to and from the destination – S said the airline was only able to give Mrs D vouchers, rather than a full refund. Even though Mrs D wanted a refund, S said they wouldn't issue one and would arrange for the vouchers to be issued.
- Domestic flights within the destination – S said they weren't going to refund Mrs D the £412 that this was invoiced for because she'd only be due a refund of the domestic flight if the airline cancelled the flight or if the ticket was a refundable fare. However, neither were the case here.

Mrs D didn't receive the refund of £1,482 S said they would give her. And despite several requests over the year from 2020 to 2021, Mrs D still didn't receive the refund nor the airline vouchers that S said they'd arrange for her and her husband. So, Mrs D raised a claim with her insurer first. But this claim was declined.

Mrs D then contacted AESEL on 14 September 2020 and asked for her claim to be considered under the chargeback rules. AESEL said this wasn't possible as she'd raised a claim outside of the time limits prescribed by its scheme rules. So, Mrs D raised a claim under Section 75 Consumer Credit Act 1974 (Section 75) with AESEL the following day and said she felt there had been a breach of contract as S hadn't refunded her the £1,482 nor did she receive the airline vouchers. Mrs D said she actually wanted to claim back the full amount of the holiday, which was £4,486 through her Section 75 claim. And that she still hadn't received the partial refund S said they'd give her.

In December 2020, Mrs D's husband contacted S via an online platform about getting the partial refund. S apologised for the delay and explained they were still impacted by the effects of Covid-19. S also confirmed Mrs D should get her refund by March 2021. But Mrs D says she didn't get the refund by this date.

On 30 July 2021, AESEL sent their response to Mrs D about her Section 75 claim. In this, they said they could see Mrs D had cancelled the holiday and not S. AESEL also said S' terms and conditions explained that although S didn't apply booking charges, the providers of the services in the holiday package did. AESEL said the terms and conditions showed any cancellation request made 30 days before or in the event of a no show would incur a cancellation charge for the full package cost. So as Mrs D cancelled her holiday 15 days before it was due, no refund was due under S' terms and conditions. In relation to the refund of £1,482 S said they'd give Mrs D, AESEL said this was made outside of S' terms and conditions and was therefore, not a breach of contract. AESEL also added the refund of £1,482 was made by S as a gesture of goodwill and it didn't form part of Mrs D's original contract with S. Mrs D disagreed. She explained that S' emails confirming the refund they were prepared to give her along with what they told her husband via the online platform were contractually binding.

Our Investigator looked into Mrs D's concerns. Ultimately, she didn't think AESEL had acted unfairly when considering Mrs D's chargeback claim request as Mrs D had made her request too late. In relation to Mrs D's Section 75 claim, our Investigator said at the point Mrs D cancelled the holiday on 17 March 2020, the services were still available to Mrs D. As S' terms and conditions said if a request was made to cancel less than 30 days before the holiday was due to start, then no refund would be due. So, our Investigator concluded that because Mrs D cancelled the holiday, rather than the holiday being cancelled, there had been no breach of contract or misrepresentation. Our Investigator also felt the offer made by S to give a partial refund and airline tickets wasn't part of Mrs D's contract. So, she didn't think AESEL had acted unfairly in not instructing S to do what they said they'd do.

Mrs D disagreed. In summary, she said she'd sought legal advice about her claim and she was told the offer made by S to give her a partial refund and the airline tickets became part of her contract with them for the provision of services relating to her package holiday.

Therefore, Mrs D said she thinks AESEL could be held jointly liable for the breach of contract for S' failure to provide her with the partial refund and airline tickets. Mrs D also didn't think S' terms and conditions where it explained if a request was made to cancel less than 30 days before the holiday was to start than no refund would apply in her case because said she never received S' terms and conditions – Mrs D only found these when searching S' website. Because of this, Mrs D didn't think S' terms and conditions were applicable to her contract with S. So, the complaint has been passed to me to decide.

Since Mrs D's complaint has been with our service, AESEL offered Mrs D £50 compensation for the delay in progressing her Section 75 claim as full and final settlement of her complaint. However, I can't see Mrs D accepted this in full and final settlement of her complaint. So, I'll consider whether I think this compensation is fair for the delay caused.

I issued a provisional decision and set out the below:

I thought it would be helpful for me to set out at this point that this decision is solely about the actions of AESEL. It's not about S who aren't party to this decision and who aren't within our service's remit for complaints in relation to chargeback and Section 75. I hope this distinction is clear.

Chargeback

In certain circumstances, when a cardholder has a dispute with a merchant, as Mrs D does here, AESEL (as the card issuer) can attempt a chargeback. AESEL told us Mrs D contacted them to raise a chargeback claim on 14 September 2020 – around five months after Mrs D was due to go on holiday. AESEL said this was done outside of the timeframes that apply under the chargeback rules, so Mrs D's request for the claim was rejected.

I think what AESEL have said broadly seems right to me based on the information I have about the way their scheme operates. With that said, I think there is another reason why Mrs D should receive a full refund of what she paid for the holiday, which I'll go on to.

Section 75

In deciding what I think is fair and reasonable I need to have regard to, amongst other things, any relevant law. In this case, the relevant law is Section 75 which says that, in certain circumstances, if Mrs D paid for goods and services, in part or whole, on her AESEL credit card, and there was a breach of contract or misrepresentation by the supplier, AESEL can be held responsible.

In addition to this, I note our Investigator explained that she didn't think the Package Travel and Linked Travel Arrangements Regulations 2018 (PTRs) applied in Mrs D's case. This was because the agent, S, weren't based in the United Kingdom (UK). However, regardless of their location, I think the PTRs do apply. I say this because having read "The Package Travel and Linked Travel Arrangements Regulations 2018, Guidance for business" it explains "the regulations apply to package travel contracts and linked travel arrangements sold, or offered for sale, in the UK no matter where the seller is established." Therefore, I'm satisfied the PTR's ought to be considered in this case even though S were based outside of the UK.

For a valid claim under Section 75 there must be a debtor-creditor-supplier (DCS) arrangement in place. This means the creditor (AESEL) must provide credit that finances a transaction between the debtor (Mrs D) and the supplier (S).

AESEL say S acted as an intermediary and booked separate elements of the holiday on Mrs D and her husband's behalf. Therefore, AESEL say they don't have a clear contractual link with the suppliers of the services booked and so Section 75 isn't applicable as the DCS relationship was not made out.

I've considered AESEL's point and I've also looked at Mrs D's bank statement which shows the payment Mrs D made using her AESEL card was directly to S. Additionally, Mrs D booked a package holiday which is defined in the PTRs as "a combination of at least two different types of travel services for the purpose of the same trip or holiday". And the PTRs imply certain terms into the contract – one of those terms is that the agent, in this case S, is responsible for the delivery of all the different travel services in the package to Mrs D, irrespective of whether those services are to be performed. So, the DCS relationship is made out here.

Another condition necessary for a valid claim under Section 75 is that the service provided by the website must have a cash price of more than £100 and up to £30,000. In this case, I've seen that Mrs D paid a total of £4,486 for the holiday. So as this amount is within the limits, I think Mrs D could have a valid claim under Section 75.

So, I've established that the necessary arrangements exist for a claim under Section 75 and that the cash price of that service is sufficient for Section 75 to apply. Next, I need to

consider whether there's been a breach of contract or misrepresentation by S.

Mrs D emailed S on 17 March 2020 confirming that she wanted to cancel the holiday because of the recent FCDO guidance which had been released advising against all but essential travel. I can see the FCDO released this guidance on the same day Mrs D contacted S to cancel her holiday. The guidance specifically states that consumers should not visit the country Mrs D was travelling to unless it was for essential purposes.

Regulation 12 of the PTRs explain that in "the event of an unavoidable and extraordinary circumstances occurring at the place of destination...which significantly affect the carriage of passengers to the destination, the traveller may terminate the package travel contract before the start of the package without paying a termination fee...the traveller is entitled to a full refund of any payments made for the package but is not entitled to additional compensation". With this in mind, at the point Mrs D contacted S to cancel the holiday, she was being advised not to leave the UK for non-essential travel.

I think unavoidable and extraordinary circumstances would include FCDO advice not to travel. I say this having due regard to The Competition & Markets Authority's (CMA) open letter to the package travel sector which sets out how suppliers should be viewing this issue generally. They confirmed that FCDO advice against travel, or all but essential travel, to a particular country or region amounts to compelling evidence of extraordinary and unavoidable circumstances occurring at the holiday destination. Therefore, I think Mrs D was able to cancel the whole package and receive a refund of the full cost of the holiday in accordance with Regulation 12 of the PTRs. As a result of this, I think there has been a breach of the terms implied into the contract by the PTRs by S. So, I think AESL treated Mrs D unfairly when it declined to meet her claim under Section 75. I think Mrs D should therefore, receive a refund of the £4,486.

Additionally, Mrs D is unhappy with how long it took AESEL to provide her with an answer to her Section 75 claim. From looking at the notes, it seems Mrs D raised a Section 75 claim on 15 September 2020. Mrs D contacted AESEL on 28 March 2021 to let them know she still hadn't heard from them about her claim and that it had been six months since she raised it. AESEL responded to let her know that there was no specific timeframe for their investigation to be completed in and that her Section 75 claim was still under review. AESEL then issued their response to Mrs D's Section 75 claim on 30 July 2021 – in this they explained they weren't upholding her Section 75 claim as they didn't feel there had been a breach of contract by S. So, all in all, it took around ten months for AESEL to give Mrs D an outcome on her Section 75 claim. AESEL recognised Mrs D's claim was open for a length of time and offered her £50 compensation for this. I've thought about what AESEL have offered, however, I think they should award more compensation. I say this because while I appreciate AESEL told Mrs D that there was no set timeframe in which they needed to investigate her claim, I think ten months is quite a long time to receive an answer. I can understand it would have been frustrating for Mrs D to wait this long without any update or explanation for why it was taking AESEL some time to provide her with a response. With that in mind, I think AESEL should pay Mrs D £150 compensation for the distress and inconvenience caused.

Lastly, Mrs D has also raised a point about not being given a copy of S' terms and conditions at the time. Therefore, she doesn't think they apply in her case. Mrs D has also raised the fact that the partial refund and airline voucher promised to her by S should form part of her original contract with S. Given I'm upholding Mrs D's complaint for other reasons, I don't find it necessary to comment nor make a finding on these additional two points.

Putting things right

As explained above, I find Mrs D had a valid claim under Section 75 for the cost of her holiday. Therefore, I currently think AESEL should:

- Rework Mrs D's credit card account as though the payment of £103.54 made in November 2019, had been refunded on the date the Section 75 claim was originally declined. This means any interest, fees or charges relating to the payment from that date should be refunded, and any negative credit file reporting which may have been caused by it, removed. If a credit balance would have arisen on the account at any point, 8% simple interest per year* should be added to the refund, calculated from the date the credit balance would have arisen, to the date it would have ceased to exist.*
- Reimburse Mrs D the amounts she paid by bank transfer to S, namely:*
 - £1,704 paid on 9 January 2020*
 - £2,682 paid on 4 November 2019*
- Pay Mrs D 8% simple interest per year* on the reimbursed amounts above, calculated from the date the Section 75 claim was originally declined, to the date Mrs D receives the reimbursement.*
- Pay Mrs D £150 compensation.*

**If American Express Services Europe Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs D how much it's taken off. It should also give Mrs D a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.*

AESEL didn't respond to my provisional decision. But Mrs D did. She explained that on 21 June 2022, she received the refund of £1,482 that S said they would pay her. Mrs D also said that when we relayed the £50 offer from AESEL, we didn't explain it was an offer in full and final settlement of her complaint. Mrs D says she believed this offer was being made for the delay in reviewing her 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.

I'd like to clarify the offer of £50 AESEL said they wanted to make was for the delay in progressing Mrs D's Section 75 claim. But I'm sorry we didn't relay to Mrs D that they were offering this as full and final settlement of her complaint.

Putting things right

As Mrs D has received a refund from S of £1,482, I think it's only fair that this amount is deducted (after interest) from the overall calculation as set out in my provisional decision. To confirm, I require AESEL to:

- Rework Mrs D's credit card account as though the payment of £103.54 made in November 2019, had been refunded on the date the Section 75 claim was originally declined. This means any interest, fees or charges relating to the payment from that date should be refunded, and any negative credit file reporting which may have been caused by it, removed. If a credit balance would have arisen on the account at any point, 8% simple interest per year* should be added to the refund, calculated from

the date the credit balance would have arisen, to the date it would have ceased to exist.

- Reimburse Mrs D the amounts she paid by bank transfer to S, namely:
 - £1,704 paid on 9 January 2020
 - £2,682 paid on 4 November 2019
- Pay Mrs D 8% simple interest per year* on the reimbursed amounts above, calculated from the date the Section 75 claim was originally declined, to the date Mrs D receives the reimbursement.
- Then deduct £1,482 from the total amount due to be reimbursed to Mrs D.
- Pay Mrs D £150 compensation.

*If American Express Services Europe Limited considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Mrs D how much it's taken off. It should also give Mrs D a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

My final decision

For reasons explained above, I uphold this complaint. And I require American Express Services Europe Limited (AESEL) to carry out the actions as set out under the 'putting things right' section of this final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs D to accept or reject my decision before 19 August 2022.

Leanne McEvoy
Ombudsman