

## **The complaint**

Mr H complains that The Co-Operative Bank Plc trading as Smile failed to refund several transactions that he didn't recognise.

## **What happened**

Mr H was visiting abroad with friends and when they arrived late in the evening they went out to a local bar. Up to this point Mr H says he wasn't drinking and sometime later the group split, and Mr H went to a bar nearby with some friends. The bar was an adult entertainment venue and shortly after arriving some of the group left to find food, leaving Mr H with one other of his group. His friend went to a private room with a staff member leaving Mr H alone in the main area of the bar to wait for his friend.

Mr H was told that he must buy a drink or leave, at which point he paid for a drink and was given a free "shot". Mr H described the staff as being insistent he drink the shot. Shortly after, Mr H described himself as feeling strange and euphoric. Mr H has only a vague recollection over the next five hours but remembers being taken to a private room and at one stage being shouted at to make a transaction with his card and Personal Identification Number (PIN).

Mr H sent a garbled message to his group which looks like he was telling them he wasn't being allowed to leave the club and this was after a large payment was made using his phone via the Apple Pay system. The message wasn't seen by the group until later that morning. Mr H has explained that the friend he was with was collected by his partner, but they didn't realise he was still at the club.

Once the group realised Mr H was still missing they tried calling him. His phone was occasionally answered by someone other than Mr H. Eventually the group were able to track Mr H to the club and tried to gain entrance but were denied. Some of the group reported Mr H missing to the local police and shortly after Mr H was found by members of his group close to the bar. The bar closing hours were reported as being four hours earlier that morning from when Mr H was found.

Mr H returned to his hotel and slept for a while. Later that morning, Mr H's partner called Smile about his account as it looked like Mr H had been drugged and his account was showing a negative balance. Smile blocked his debit card and credit card but couldn't reveal anything further because Mr H couldn't remember his security details. Once Mr H was feeling better, he spoke to Smile and they told him about several transactions that had happened during his time at the club.

Some had been declined, but quite a few had gone through totalling over £8,000, including about £2,000 from an overdraft. Smile told Mr H that they'd flagged several payments which meant sending a message to Mr H's phone. Because Smile had received confirmation from his phone, they were allowed to go through. Mr H initially told Smile that his cards were stolen, but later confirmed to Smile that he still had possession of both his phone and cards. Smile confirmed attempts were made using Mr H's credit card which were all declined, and Mr H also denied moving a few hundred pounds to another account.

Smile advised Mr H to report the circumstances to the local police, which he did before leaving the country. He's since given them (local police) more details of what happened. Mr H returned to the UK and remained in touch with Smile who looked into what had happened. Smile eventually told Mr H that they believed he'd authorised the transactions and declined to refund him.

Mr H complained to Smile about how they'd handled his issue and the outcome of their investigation. He maintained that he'd been drugged and hadn't consented to the payments he disputed. Smile didn't change their position and wrote to Mr H, in summary they said:

- Mr H's story about whether he still had his card changed.
- He didn't "*express any outward shock at the transactions*".
- He'd allowed his partner to access his phone and his recollections were hazy and inconsistent.
- Mr H was able to reply to texts (from Smile) and send a message to his group despite saying he was unconscious or blacked out.
- He hadn't kept his security details secure.
- No one else in the party was drugged and he didn't leave when he had the opportunity.
- Mr H hadn't reported the incident to the police before contacting Smile.

Mr H brought his complaint to the Financial Ombudsman for an independent review.

It was looked into by one of our investigators who asked for evidence from both parties. Mr H continued to provide details of what happened including call logs, texts and details of others who had had the same experience as him at the same bar. Mr H was able to provide other details that related to the closure of the bar and arrests following a police investigation into drugging and robbing clients of the bar.

Smile provided details of phone calls with Mr H, system information about the transactions and their assessment of what they believed had happened and their reasons for declining to refund Mr H.

Smile's position was that:

- All the disputed transactions used Mr H's Apple Pay system which was enabled using facial recognition on his phone, apart from one that used his card and PIN.
- Mr H had responded to flag messages from Smile confirming certain transactions.
- They didn't think a third party was responsible because Mr H's friends were in the club and wouldn't leave him in a drugged state.
- They didn't think a third party would continually take and replace his card and phone over the five hours that the disputed transactions took place because it heightened the risk of Mr H being aware of the activity.
- Smile thought the gaps between payments were supportive of genuine transactions and thought if an unauthorised third party had the card and phone they'd be more likely to empty the account as fast as possible.
- They thought that even if his drink was spiked, when considering all the other factors, Mr H had authorised them himself.

- Smile thought that the facial recognition technology meant that Mr H was awake when the payments were made.

Our investigator considered the complaint and thought it was reasonable for Smile to hold Mr H responsible for the transactions. Various scenarios were considered, and our investigator was persuaded that Mr H had authorised the disputed transactions. It was noted that no medical evidence existed about Mr H's drugged condition and he admitted to entering his PIN into a machine. He retained his phone and card and had used them at various points so overall it was more than likely him who made the transactions.

Mr H disagreed with the investigator's outcome and commented:

- Smile had agreed he was a victim of crime
- There was ample reporting of criminal activity involving the club that matched what happened to him.
- The pattern of transaction isn't supportive that it was him. Transactions were attempted for much larger amounts and once they were declined, smaller ones were used, and this indicates the criminals were adapting to the fraud systems and text messages.
- Sending a text for help was supportive of his overall position so he wouldn't have then been likely to agree to fraud alerts.
- The later transactions reduced in amount until the final one practically emptied the account with a similar amount which is unlikely to be related to a "purchase" – rather what was left in the account.
- Numerous calls were made to his phone and answered by someone else. It's likely his phone was in the possession of whoever was making transactions for long periods.
- Mr H also provided information that his phone had been charged whilst in the club and various apps and screens left open for long periods of time which he says indicates it was being used by others.

Mr H's complaint was passed to me and 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 and the Consumer Credit Act 1974. The basic position is that Smile can hold Mr H liable for the disputed payments if the evidence suggests that it's more likely than not that he made them or authorised them.*

*If Mr H made the disputed transactions himself, it wouldn't be fair to ask Smile to refund them. But Mr H says he wasn't responsible for the payments in dispute. So, the key question for me to consider is whether Smile has provided enough evidence to hold Mr H responsible.*

*Smile can only refuse to refund unauthorised payments if it can prove Mr H authorised the transactions, but Smile cannot say that the use of the card and PIN or the use of Apple Pay conclusively proves that the payments were authorised.*

*Unless Smile can show that consent has been given, it has no authority to make the payment or to debit Mr H's account and any such transaction must be regarded as unauthorised. To start with, I've seen the bank's technical evidence for the disputed transactions. It shows that the transactions were authenticated using the payment tools issued to Mr H.*

*In summary, Smile say they can hold Mr H responsible because there's no plausible explanation for how the payments were made without Mr H's involvement. They contend that it's unlikely that anyone other than him could have used his phone to authorise the Apple Pay transactions and no one else knew the PIN for his debit card. Mr H had both card and phone in his possession and because it was protected, only he could have answered the fraud texts from Smile.*

*The scenario described by Mr H is that he was alone in the club and given a drink that appears to have been drugged. A large number of disputed transactions then took place, including a Chip and PIN payment, numerous Apple Pay transactions using Mr H's phone and an attempt to use the magnetic strip on Mr H's card.*

*Mr H argues that he had no intention of making these payments and that's supported by his attempt at messaging his group early that morning. Although the message is somewhat garbled, I think it's reasonable to read into what he sent as an alert to his group that something was wrong. So, I don't think it's clear that the following payments were intended to be made by Mr H, despite the appropriate authorisation being received by Smile (that being the agreed way to authenticate the payments), although I understand why Smile made the payments on Mr H's behalf because they'd received the appropriate instruction to do so.*

*It's apparent that there was one Chip and PIN payment made by Mr H, and only he had the PIN. But what he described about the payment was him vaguely aware of being shouted at to make it. That doesn't seem like the circumstances where he was voluntarily making the payment, more like he was being coerced into it whilst under the influence of whatever he'd been given earlier that night.*

*As far as the Apple payments go, Smile suggested that it would be difficult to make them if Mr H was blacked out, due to the security features on his phone. It's not known if this feature was enabled nor if Mr H was actually unconscious whilst these payments were being made. I can't know, as neither can Smile, what happened in the room at the club, but it's apparent that Mr H was under the influence of something – as evidenced by his inability to communicate with Smile when his girlfriend spoke to them later that morning.*

*Mr H hadn't been drinking prior to going out late that evening and none of the descriptions of that evening indicate there was heavy drinking – so Mr H became under the influence of something very quickly – he thinks this was the free shot he was persuaded to take and I think this is probably what happened.*

*Considering the ease with which payment systems like Apple Pay can be used – especially with facial recognition engaged and the account holder being under the influence – I don't think it's particularly implausible that the Apple Pay transactions could have been carried out against his wishes.*

*When examining the attempts to use the card/Apple Pay, it's evident that several transactions were declined by various fraud systems. The pattern of the transactions tells its own story:*

Time	Amount (£)	Method	Result	Notes
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04:04	23.60	Contactless/Apple	A	
04:14	573.07	Contactless/Apple	A	
04:36	1021.22	Contactless/Apple	D	SMS sent at 05:00 for this payment.
04:36	573.07	Contactless/Apple	D	
04:40	592.07	Magstripe	D	
04:59	598.45	Contactless/Apple	D	
05:33	574.66	Chip & PIN	A	SMS confirmed at 05:25
05:52	769.38	Contactless/Apple	A	
06:16	1080.11	Contactless/Apple	D	Business Closed at 06:00
06:22	1080.11	Contactless/Apple	D	
06:23	769.38	Contactless/Apple	A	
06:54	769.38	Contactless/Apple	A	
07:14	769.38	Contactless/Apple	A	
07:35	769.38	Contactless/Apple	A	
08:00	965.70	Contactless/Apple	A	
08:21	985.33	Contactless/Apple	A	
08:54	1314.10	Contactless/Apple	Not Authorised	
09:00	769.38	Contactless/Apple	A	
09:21	383.90	Contactless/Apple	A	

*The first payment is acknowledged by Mr H (£23.60), at which point Mr H's testimony is that he was drugged. The next payment is via Apple Pay, followed by an attempt for over £1,000 which was declined. It appears that this payment triggered a fraud text from Smile, which was confirmed by whoever answered Mr H's phone – but it wasn't successful, and this is probably because of additional Apple Pay restrictions.*

*Immediately a new attempt was made using the previous successful amount (£573.07), but that was declined, so another attempt was made for a similar amount using the magstripe on the card – again declined. A third unsuccessful attempt was made, at which point the confirmation of the text was received by Smile and they advised that this allowed further payments to go through.*

*The payment type was changed to Chip and PIN and then an Apple Pay for a higher amount – both successful. Another attempt was made for over £1,000 which was declined on two occasions before the amount was again reduced and six successful transactions were made, slowly increasing before a further £1,000 plus attempt was made which was declined.*

*The next attempt was made for a lower (but previously successful amount) until the final payment was authorised which consisted of the bulk of the remaining overdraft available in the account.*

*When looking at this, it appears that whoever was making these payments was reacting to the banks position on the amounts. The amounts increased to a point where they were declined and then dropped to lower amounts, to then increase again. The final payment looks more like an attempt to empty the account rather than purchase a legitimate service. So, I think that together with Mr H's attempted message to his group that he didn't want to be in the club and the pattern of payments – leads me to the conclusion that I think these payments were taken against his wishes.*

*Mr H reported his experience to the local police and became aware that the same club he was in was part of a widespread criminal enquiry centred on the exploitation of customers similar to himself. So, it's not just Mr H's experience at the club, it seems as though many people suffered similar issues with their bank details. Whilst I'm not considering anyone else's experience here, it is supportive of Mr H's complaint that others suffered a similar loss to himself.*

*Smile have also argued Mr H didn't keep his security credentials secure and sighted the example of his partner using his app when they called Smile to block the cards. Having listened to this call, it's apparent that Mr H is recovering from whatever happened to him earlier, but he is awake.*

*Because Mr H was awake, I would think it likely he opened his phone/app for his partner to use but he was insufficiently recovered to have a conversation with the bank. This was shown to be the case because he couldn't remember basic security details about his account. I don't think Smile can conclude that Mr H was negligent by this example, rather this appears to be a concerned partner trying to help with a difficult and worrying situation.*

*Smile believed the timing of the transactions was supportive that it was Mr H who made them and it was unlikely to have been a staff member taking and replacing the card/phone to make the payments. Smile appear to be saying that as the payments were spread out over a period – this is evidence that the payments were legitimate. I understand their point and in cases of card/phone theft – it's unusual to see payments spread out because the owner of the card/phone could notify the bank of their loss at any time. That's not the same situation as this one because it certainly appears that Mr H was under some form of influence. I would think this means the staff members who drugged him would likely be aware of the affect it has on a person (they seemed to be quite experienced considering the police investigation into them) and realise how much time they had. There was no need to rapidly empty the account – and when they attempted to do this they were frustrated by the banks systems.*

*When considering the scenario Mr H explained – he was taken to a room which went unnoticed by his remaining friend. So, I don't think the "take and replace" is relevant here as it appears Mr H was under the control of staff members and isolated in a room. There didn't need to be anything other than obtaining his phone and card to make these transactions once they had control of him.*

*In summary – whilst the proper form and function were used to make these transactions, the evidence I've considered leads me to an objective conclusion that I think Mr H had no intention of making these payments and, via various means, these payments were taken against his wishes. I'm currently of the opinion that I intend to uphold this complaint and require Smile to repay the disputed transactions taken from that venue, which are all those after the first payment (which Mr H accepts he made). I'll also be requiring Smile to add 8% simple interest to the positive balance taken from the account and remove the overdraft plus any charges or interest applied as a result of these transactions to put Mr H back in the position he would have been had these transactions not taken place.*

*When Mr H brought his complaint to our service – he was only seeking a refund of the disputed transactions. I've thought about the issue of compensation and I'm not currently intending to recommend any. That's because the issue of Mr H's loss was the result of third parties taking the money from his account. I recognise the difficulties Mr H faced dealing with the problem, but any recommendations for further payments would have to be based on the actions of Smile, rather than the overall situation Mr H found himself in.*

*I'll be happy to consider any further submissions regarding this, or any other aspect of the complaint.*

I invited Mr H and Smile to give me any more evidence and information they wanted me to consider before issuing my final decision. Mr H accepted my provisional decision and Smile asked for disclosure of evidence which was provided to them. They also commented that:

- Because Mr H was able to send a text, he was able to authorise transactions.

- Smile questioned the sequence of events around the friend's attendance at the club and what happened afterwards.
- Smile didn't think that Mr H's version of the events was consistent.
- Smile questioned why Mr H didn't report the matter to the police until they told him to.
- Smile questioned why Mr H visited that particular club instead of a different one.
- Smile questioned why Mr H didn't seek medical advice.
- Smile thought the award of 8% interest would represent significant betterment.

### **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.

It's apparent that Smile didn't believe Mr H's version of events and they thought he'd been able to authorise the transactions – which is why they held him responsible. I've carefully considered the points raised by Smile in their further submission and it's clear that this is a finely balanced complaint.

Regarding the additional points raised by Smile – I'll provide my thoughts about them here. But my focus is on what I think the key issues are as our rules allow me to do this and it reflects the nature of our service as an informal alternative to the courts. So, if there's something I've not mentioned, it isn't because I've ignored it, it's because I'm satisfied that I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

Overall, the evidence points to Mr H being influenced by something he was given during the night out. It's not possible to accurately assess what the ongoing affects on him were, but his performance the morning after when the call was made to Smile with his girlfriend showed that he was still recovering. I'm not surprised that Mr H's recollection of what happened was imperfect given I think he was probably drugged.

Smile believed that the timing of his text meant that he was able to authorise transactions around that same time. That's because he was able to compose a message and send it to his group. As I've already explained, the message was poorly written which I think adds to Mr H's version of events that he was under the influence of something at the time. It's not possible to determine his condition at any point during the visit after he was given the shot, but I think it's reasonable to assume he probably had periods where he was conscious something was wrong – hence the text, but I don't think this points to him being conscious of what was happening to him in a broader sense. If Mr H was more aware – I'd have expected him to leave the club or call his friends. He didn't do that, and I think this was because of the effect the shot had on him.

Smile thought the sequence of events surrounding the attendance of the club and when Mr H's friends turned up wasn't accurate. I think what's relevant here is that Mr H was left alone in the club (despite what Smile believe happened) and he eventually left (or was put out by the staff when his accounts had been emptied). What's apparent is that his friends were looking for him and had been in contact with the police, before finding him on the street.

I don't think the fact that Mr H hadn't personally reported the issue to the police when he spoke with Smile is particularly relevant here. I appreciate Smile thought he should have done, but as he was likely still suffering from the shot he was given, I can understand why he was still in his room recovering and trying to deal with the loss of his funds.

Smile commented that Mr H had a choice whether he entered the club or not. My

understanding of what happened is that Mr H went to the club because another member of the party wanted to go, so he stayed with him until the friend went with a member of the staff to a private room. This left Mr H on his own – at which point he was given the shot. He wasn't aware of what was going to happen to him prior to entering the club and I think it's worth reiterating that the loss of his funds was likely at the hands of a criminal enterprise.

I appreciate Smile's comments about Mr H not seeking medical attention. Ultimately it was his choice, so I've had to consider what I think likely happened on the available evidence. It seems to me that Mr H was under the influence of something and his actions at the club (sending the text) and the manner in which the payments were taken and those that were declined – leads me to believe that Mr H wasn't in a position to know what was happening with his card and device – probably because he was given a substance.

Smile believe the award of 8% simple interest would result in betterment for Mr H. Interest awards of this nature – here only for the positive balance on the account at the time ( Mr H's own funds) seek to provide Mr H with an interest payment that recognises he was deprived of the use of those funds. The rate of 8% (simple per annum) is based on a similar award used by the civil courts.

Having considered the comments and points made by Smile, I haven't seen anything that would change the outcome of my provisional decision. I understand they have a different perspective on the events that happened at the club, but my assessment of Mr H's complaint is that he was a victim rather than a willing participant – evidenced by the text he sent for help and the pattern of transactions made from his account. So, I see no reason to change my provisional decision and I uphold this complaint.

### **Putting things right**

Smile should refund the disputed transactions which are all those taken at the venue apart from the first one. Smile should add simple interest at 8% per annum from the date of loss to the date repaid and remove the overdraft and any charges or interest related to it.

### **My final decision**

My final decision is that I uphold this complaint against The Co-operative Bank Plc and they're instructed to settle this complaint as outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 31 August 2022.

David Perry  
**Ombudsman**