

## **The complaint**

A company I'll call F complains that First Data Europe Limited trading as FDMS (First Data Merchant Solutions) ("First Data") unfairly declined to refund transactions it says it didn't authorise.

F is represented by its director, Mr V.

## **What happened**

Between December 2020 and March 2021, one of F's employees (X) fraudulently processed false refunds totalling £3,322.89. Mr V said X had reset the system after hours so the refunds didn't show the next day. And that he only discovered the fraud when X forgot to reset the system one day. Mr V says X was a long-term employee and hadn't been given permission to make the transactions.

Mr V complained to First Data, saying he thought transactions should only be processed to the value of an initial purchase, meaning First Data should have prevented the refunds. He also felt that First Data wasn't providing enough assistance to the Police to help the ongoing criminal enquiries. First Data issued its final response to F's complaint on 30 March 2021. It said it couldn't refund the transactions because staff fraud was involved and the matter had been reported to the Police. And it confirmed the requested documentation had been sent to the Police.

Mr V didn't agree, so he brought F's complaint to our service. Our investigator upheld the complaint in part. She said First Data should issue a refund because she wasn't persuaded F had authorised the transactions. But she felt F had to accept some of the blame, because Mr V hadn't checked monthly statements issued by First Data that showed the refunds.

Mr V didn't agree. He said he hadn't received the statements, despite chasing First Data for them, so he didn't accept any responsibility for the loss. Our investigator asked Mr V to send in evidence to show he had chased First Data for statements, but Mr V didn't submit anything.

First Data also disagreed. It said it shouldn't be held liable as this was employee fraud and it felt the Payments Services Regulations had been superseded by 'criminal law'. It said it intended to make further submissions, but it ultimately didn't do so.

Because neither party accepted our investigator's findings, the matter came to me to issue a final decision.

## **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.

Our investigator set out the regulatory framework at play in this situation in detail, so I'll simply summarise the key points in this decision.

### *Assisting the Police*

I've seen an email thread between First Data and Mr V in which he requested various documents to be sent to the Police. While First Data wasn't able to send the information straight back in that thread, it gave Mr V guidance on how he could obtain the information by following First Data's process. The information sought was not a simple request and I can't say First Data treated F unfairly by not complying with Mr V's specific request, given it followed its own procedure.

### *Authorisation*

It's not disputed that the transactions in question were processed by a party without F's express authority. However, First Data argues that X was effectively given authority to make the transactions, because X was given access to the card and terminal. And because F didn't take sufficient steps to prevent employee fraud. And it set out the steps F could have taken.

I've seen correspondence between F and the Police and I accept F didn't directly authorise the refunds in question. With that being said, what First Data is effectively raising is the principle of 'apparent authority'. That is to say that F permitted X to appear to First Data as if H had F's authority to make the transactions. And, if I were to accept that argument, First Data wouldn't be liable to refund F.

However, apparent authority can't be given negligently, and so I'm not persuaded that the principle applies in this case. Mr V has explained that X snuck in after hours and processed the refunds without anyone around, then wiped the system to cover his tracks. Because of the dishonest and clandestine nature of the circumstances of this particular case, I'm not satisfied apparent authority applies. So, I consider that the transactions were unauthorised.

### *Gross negligence*

First Data's other argument that F didn't take sufficient steps to prevent the fraud from happening amounts to a defence of gross negligence. That is to say that F failed with gross negligence to comply with its obligations as a payment service user, and that allowed the disputed transactions to take place.

First Data says F had the option to setup a security code, meaning only a supervisor could process refunds. And that its Merchant Operating Guide (Guide) provided guidance on how to prevent fraud that F should have followed. However, the test for gross negligence has a high bar and simple carelessness doesn't relieve a payment service user of its right to a refund.

Most of the advice contained in the Guide doesn't apply to the circumstances of this particular case, with the exception of the suggestion that daily checks are carried out to ensure the device hasn't been tampered with. I'm not persuaded that failing to undertake daily checks amounts to gross negligence, given the system was wiped each evening by a trusted, long-term employee.

And I don't accept that failing to set a security code amounts to gross negligence either. It would have been advisable for F to set a security code, and doing so might have prevented this fraud if the code was only known by Mr V. But that falls some way short of the requirement for me to make a finding of gross negligence.

### *Contributory negligence*

With all of the above being said, I agree with First Data that some responsibility should fall on F's shoulders on this occasion. I've seen dated statements that First Data says it sent, which would have alerted Mr V to the fraud, had he checked them. Mr V says he didn't receive these and that he had called First Data on several occasions to chase them. Our investigator gave Mr V the opportunity to demonstrate he had tried to chase the statements, for example sending in a screenshot of his phone displaying the call he says he made to First Data, but he didn't do so. So, based on the evidence I have before me I'm satisfied that First Data did issue the statements, and I haven't seen evidence to persuade me that Mr V didn't receive them.

For the reasons I've set out above, I'm not satisfied that the transactions in dispute were authorised and I haven't seen sufficient evidence to persuade me that F was grossly negligent, such that it would be liable for the transactions. But I take the view that F could have done more, so I agree with our investigator that F should share some of the loss here and I agree that a 50/50 split is fair. First Data should also compensate F for the time it went without that money by paying simple interest at a rate of 8%.

### **My final decision**

My final decision is that First Data Europe Limited trading as First Data Merchant Solutions must pay F £1,661.45 plus simple interest at the rate of 8% from the date F raised its complaint to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask F to accept or reject my decision before 5 April 2023.

Alex Brooke-Smith  
**Ombudsman**