

## The complaint

Mr D complains about a marker that Tesco Personal Finance PLC (trading as Tesco Bank) have recorded against him with the fraud prevention agency CIFAS. He'd like the marker removed.

## What happened

Mr D held a current account with Tesco Bank. In June 2019 he reported that the requested cash from an ATM didn't dispense. Tesco investigated and issued him a refund. Over the next several days he reported another three disputes at the same ATM. However, Tesco Bank declined to refund these. They took back the temporary credits applied to the account, which left the account in an unarranged overdraft.

Mr D complained, but Tesco Bank didn't think they'd done anything wrong. They issued a response in July 2019, saying they had received notification that in these cases the funds were dispensed. They explained if they found evidence of any invalid claims, they could take back any temporary credits. They also explained that they couldn't close the account until the overdrawn balance was repaid. The response offered Mr D referral rights to our service, but he didn't contact us at the time.

In 2021 Mr D discovered that Tesco Bank had recorded a marker with the fraud prevention agency CIFAS for "misuse of facility". He complained to Tesco about this, but they didn't think they'd done anything wrong. In their response they explained they had enough information to meet the standard of proof for loading a CIFAS marker. But they said the account had remained open, when they should have closed it in 2019. They offered to pay Mr D £50 for the inconvenience.

Unhappy with this Mr D referred his complaint to our service. Tesco Bank objected to us looking at the disputed ATM transactions, as he hadn't referred this complaint to us within the six month time limit from the final response in 2019. They said this meant they wouldn't provide information on the ATM transactions.

Because this information wasn't forthcoming, our investigator thought the complaint should succeed. She explained that a CIFAS marker should only be loaded if there was sufficient evidence to show that an identifiable criminal offence had occurred, and this had to go beyond mere suspicion. She said without being able to scrutinise the evidence she couldn't state with any certainty that the CIFAS was loaded correctly. She asked for the CIFAS marker to be removed and for Tesco Bank to pay Mr D £250 compensation.

Mr D agreed, but Tesco Bank disagreed. As no agreement could be reached the case has been passed to me to decide. After reminding them of the ombudsman service's ability to request information relevant to the outcome of complaint we're investigating Tesco Bank provided information about the disputed ATM withdrawals. I also requested further information from Mr D about why he made the withdrawals and used the account, which he provided.

Having done so I wasn't minded that Tesco Bank should remove the marker. I issued a provisional decision which said:

*It's been accepted by both parties that Mr D didn't refer his complaint about the decision to hold him liable for the disputed ATM withdrawals within the six months given in the rules our service operates. The last response was sent on 19 July 2019, and so he would have needed to refer this to us before 19 January 2020. But this first contact our service had with him was in March 2021, which is well outside the timeframe.*

*As this was referred out of time, and I don't see there are any exceptional circumstances that would have prevented Mr D from referring this complaint to us, I'm satisfied our service doesn't have the power to consider that complaint. Therefore, this decision doesn't cover Tesco Bank holding Mr D liable for the transactions.*

*However, the complaint about the CIFAS marker was referred to our service in time. And I recognise that at the heart of this complaint is the same basic facts about whether the ATM disputes Mr D reported were genuine or not. Part of my consideration then will have to be the evidence Tesco Bank relied upon when deciding to record the marker with CIFAS.*

*Both parties seem to be aware of the principles CIFAS set out for reporting a marker with them, and the investigator has already provided a detailed outline, so I don't see it necessary to repeat them in full here. But in summary there needs to be clear and rigorous evidence that fraud or a financial crime either took place or was attempted – and this needs to go beyond mere suspicion. The evidence that drew them to this conclusion should also be available for the full period the CIFAS marker is recorded.*

*In the context of Mr D's complaint, Tesco Bank have applied the marker as they believe he knowingly made false claims of not receiving funds from the ATM.*

*Tesco Bank haven't supplied technical evidence for each of the ATM withdrawals – only one partial entry has been provided. Having considered it I find it inconclusive in itself. It does however show that the transactions directly before and after Mr D's were completed successfully with no errors.*

*However, looking at the broader circumstances of what happened, I think Tesco Bank have met the standard of proof required by CIFAS.*

*Tesco Bank have been able to show that the owner of the ATM – a third party bank – redebited the temporary credits they paid, which suggests they didn't find any problems or faults with the ATM at the time.*

*There doesn't seem to be a clear explanation of why Mr D used the same ATM four times in such a short space of time. While it's not unheard of for ATMs to fail to dispense cash, it's still not common. For it to happen four times to the same individual seems to be incredibly unlikely.*

*When asked why he kept using the same ATM Mr D has commented that he wanted to use one that was well lit and had a fraud prevention card cover. But this doesn't explain why he'd choose to use a machine that he says had failed to dispense cash to him on a number of occasions, particularly as it seems there were other available machines nearby.*

*The money Mr D was attempting to withdraw was transferred in shortly before each transaction from a third-party bank, which Mr D has confirmed was his. And when he received the temporary refunds, they were transferred out to this other bank account. There*

*are few other transactions on the Tesco Bank account. I find this to be a very unusual way of using the account.*

*When we asked Mr B about this, he said there was no money kept in the account so it was not a risk of being defrauded or someone scamming him, and he was reluctant to withdraw from his main bank because of this risk. But I'm not persuaded this is a reasonable explanation, as I don't see how transferring money between bank accounts before carrying out withdrawals reduces the risk of fraud or being scammed.*

*Mr D hasn't explained why the cash was needed, saying that he cannot remember because of the length of time since the attempted withdrawals. But the amount being withdrawn was fairly large, so it would strike me there would be a specific purpose that Mr D may remember.*

*Overall, I'm not persuaded that when Mr D reported the ATM disputes to Tesco Bank these were genuine disputes. The evidence held by Tesco Bank leads me to the conclusion that they were fraudulent, and I don't see any other reasonable explanation. I'm satisfied this evidence is clear and rigorous, and as such the standard of proof for CIFAS has been met.*

*However, I can see that Tesco Bank should have closed Mr D's account earlier than they did – this is an error on their part. But I can't see this would lead directly to any inconvenience to Mr D. They have already offered him £50 for this, which I consider to be more than reasonable. Because of this, I'm not minded the bank should do anything further.*

Tesco Bank accepted the provisional decision, but Mr D disagreed. He said that the way in which the marker was loaded was unjust and unreasonable, and the marker had been applied unlawfully as the standard of proof has not been met. He said CCTV footage should be supplied by Tesco.

### **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.

On review I'm still satisfied with the reasoning and outcomes explained in the provisional decision.

Neither party has objected to my reasoning around our jurisdiction, so this decision is only looking at Tesco Bank's decision to load a CIFAS marker against Mr D – although the disputed ATM withdrawals are relevant background information for me to consider.

I'm satisfied that there it would be incredibly unlikely for Mr D to have the same ATM fail to dispense cash four times in such a short space of time. And the evidence of the ATM owner recalling the funds tends to suggest there were no reported faults or problems with that particular machine at the time. I'm not satisfied this is the explanation of what happened here.

I'm also not persuaded by his explanation of why the money was being transferred in from a third party bank account, and then transferred back out when temporary credits were provided. This doesn't seem like regular account behaviour, and I don't see how this would reduce or mitigate a risk from fraud. I've seen nothing further on this point since the provisional decision.

I understand Mr D feels very strongly that CCTV evidence should be considered. However, Tesco Bank have confirmed this isn't something they reviewed at the time, so wouldn't have been part of their decision to load the CIFAS marker.

Because of the length of time that's passed since the withdrawals, and the fact that the ATM was owned by a third party bank, it's not unreasonable Tesco Bank can't supply CCTV now.

I've considered whether Tesco Bank should have got the CCTV evidence at the time. I accept this may have been helpful, but I can't for certain say that the ATM was covered by CCTV that would have been definitive in whether the cash was dispensed. So, while I acknowledge how important Mr D feels it is, I don't feel this is essential evidence to reach a reasonable conclusion. Tesco relied upon the other evidence available, which they are entitled to do.

I have to base my decision on the evidence available to me. And having done so I'm satisfied that the reasonable explanation is that the ATM dispensed cash correctly. And that when Mr D reported these to Tesco Bank, he would have been aware of this.

I'm satisfied that the evidence that supports this is clear and rigorous. I consider this to reach the standard required by CIFAS to record a marker, and Tesco Bank haven't been unreasonable or unfair in doing so.

Tesco Bank have accepted they made an error in not closing Mr D's account and made the offer of £50 for this. I've seen nothing to suggest this caused any inconvenience to Mr D. So, I don't see that Tesco Bank need to do anything further.

### **My final decision**

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 2 December 2022.

Thom Bennett  
**Ombudsman**