

The complaint

Miss J says NewDay Limited, has treated her unfairly in relation to a transaction on her credit card which paid for flights.

What happened

In March 2020 Miss J used her NewDay credit card to pay for various flights in South America. She paid a company I'll call "Firm C" who then booked the flights through three local airlines. She paid Firm C just over £1200. As the pandemic spread the three airlines supplying all these flights decided to cancel the flights. So Miss J contacted Firm C about a refund. Initially it indicated that she could get a refund but later said it couldn't refund her. Miss J also liaised with the airlines directly but didn't get a refund. I've seen that there were offers from airlines that she could rebook. So having been unsuccessful in getting a refund with Firm C she approached NewDay for help in her dispute in January 2021.

NewDay says it considered Chargeback and the Consumer Credit Act and having done so it didn't think it needed to refund her. So Miss J brought her complaint to this service.

Our Investigator decided that under the Consumer Credit Act NewDay should refund Miss J. NewDay disagree and consequently this complaint came to me for a decision.

In October 2022 I issued a provisional decision finding that NewDay didn't have to do anymore. That decision invited both parties to respond by a deadline. NewDay responded to say it agreed with my provisional findings. Miss J didn't respond within the deadline.

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.

Having issued a provisional decision on the matter and considering that NewDay agreed with it and Miss J didn't respond within the timeframe set I see no reason to deviate from the conclusions I reached in my provisional decision as described below. Accordingly Miss J's complaint does not succeed.

Miss J used her NewDay credit card to pay Firm C for the flights. This means NewDay has certain responsibilities to Miss J (if certain criteria are met) which arise from the relevant law, specifically, Section 75 of the Consumer Credit Act 1974 ('the CCA'). There is no need for me to go into great detail about how this operates, but in summary, if certain criteria are met, Section 75 has the effect of allowing Miss J to hold NewDay liable for breaches of contract by Firm C, or misrepresentations made by it in relation to the agreement made. Again without going into a large amount of detail a breach of contract occurs when one party to a contract fails to provide what it has agreed to under that contract. Misrepresentation is when something is said which is relied upon and transpires to be untrue leading to detriment.

NewDay is also a member of a card network which provides card services. And this network has rules which includes giving NewDay an avenue for card transactions to be disputed, namely through the Chargeback process.

I should also add at this juncture that this decision is solely about NewDay and whether it did what it should have and whether it treated Miss J fairly. This decision isn't about Firm C or the airlines, neither of which is within this service's remit for complaints regarding Chargeback and S75. I hope this distinction is clear.

could NewDay challenge the transaction through a Chargeback?

In certain circumstances, when a cardholder has a dispute about a transaction, as Miss J does here, NewDay (as the card issuer) can attempt to go through the Chargeback process. Miss J doesn't dispute that she used her NewDay credit card here. Nor does she dispute the amount, date, or any other details about the transaction itself. So I don't think NewDay could've challenged the payment on the basis Miss J didn't properly authorise the transaction, given what I've just set out.

NewDay has pointed to the Scheme rules about time limits to raise Chargebacks. And it notes that the transaction was in March 2020 and the flights were in summer 2020 but Miss J didn't approach NewDay until January 2021. By which time it was significantly outside the time limits applicable.

Miss J has argued it the time limits should be taken from when she knew there "was an issue" but that's not what the chargeback rules say. In this case time starts from the transaction itself or the final date of services to be provided (i.e. the last flight) or the date of cancellation. On all of these bases Miss J is out of time.

Miss J also says she thinks applying a time limit was unfair. But consumers have no right to a chargeback. Chargebacks are part of the scheme rules run by the card scheme provider (not NewDay) to settle disputes between consumers and merchants. So even if NewDay (or any other card provider) pursues a chargeback as far as it can, as the scheme itself is the final arbiter of such disputes, there is no guarantee of getting a refund. Nevertheless this service believes that chargebacks should be pursued where card providers feel they have a reasonable prospect of success.

Miss J also points to the 540-day long stop. But this is in relation to services yet to be provided. But Miss J was on notice prior to the flight dates that they'd been cancelled. So the 540 day long-stop doesn't apply here. I've considered the card network rules and it is outside of the time limits appropriate to such a dispute. So I don't think Miss J has lost out here because NewDay didn't raise a Chargeback as it would have been out of time. And consequently would have been unsuccessful.

Section 75

Before deciding on whether there is breach or misrepresentation here there are some requirements set out in the CCA which also have to be met before these issues can be considered. One of these tests is around financial limits and having considered these I think on balance that Miss J's claim meets the financial limits criteria.

Another test in the CCA for a valid claim is that there must be a debtor-creditor-supplier arrangement in place. This is often referred to as the 'DCS relationship' or simply 'DCS'. This means that there needs to be the necessary three-party relationship. This often looks like:

- A debtor (who makes repayments to the creditor for the borrowing for the purchase)
- A creditor (who has to send the borrowed amount direct to the supplier)

- A supplier (who has to provide what was purchased to the debtor)

This means that in relation to the provision of the flights the person who paid for the goods (the Debtor-Miss J) should have a contractual relationship with the airlines as well as with the credit provider (NewDay).

However in this case there is a fourth party present, namely Firm C who Miss J paid. So clearly the DCS relationship isn't in place for the provision of the flights themselves as described in the CCA.

However Firm C does provide a service as explained in its contract terms in regard to what it does in the event of flights being cancelled by airlines. These terms set out that it will help with refunds and does so at a cost which is also set out. So clearly there is DCS in place for the provision of contractual services by Firm C in the event of flights being cancelled by airlines, which NewDay can be held responsible for under S75 (but not for the provision of the flights themselves). This is a key distinction and at the crux of this dispute.

Miss J points to being told that she'd be refunded within twelve weeks by Firm C. I note on file there are emails from two of the airlines involved that make clear what the options are for Miss J regarding her flights. In essence these emails say she can rebook now or in future. Neither airline makes provision for making any refund despite the fact that it was the airlines that cancelled.

Firm C say in an email of May 2020 to Miss J that *"Unfortunately full refund is not permitted from both of airlines' but you can re-book your flight without paying any date change penalty. All you need to pay is difference in fare and tax as per availability. New travel should be completed within one year from issuing date."*

Miss J then challenges this, and Firm C respond a couple of days later saying: *"also we hope you understand that we really don't have any problem to refund the money. But unfortunately airline is not giving refund. Since airline is not giving refund we as a travel agent can't do anything. However if you wish you can speak to all three airline directly and if you can get in writing that all are giving full refund then we can try to claim refund from airline on your behalf."*

So in May 2020 I think Firm C has made clear that the airlines don't provide refunds and hence Firm C can't do anymore.

Then in August 2020 Firm C email Miss J again. In this email it says: *"Also due to involve flight cancellation you are authorize for full refund. To process the refund there will be an admin fee of £75.00 per booking deducted and remaining money would be refunded back to you."*

It then goes on to quote parts of its terms and conditions, the relevant parts being the following to my mind:

"13.2.1 There is no automatic right to a refund and, when you return an air ticket to us, we will arrange for it to be presented to the respective airline or consolidator to assess eligibility, for a possible refund in accordance with the relevant airline's or consolidator's terms and conditions."

It goes on to explain that Firm C will charge a fee for this service. And then the terms say: *"Refunds will not be paid to you until they have been received by us from the relevant airline or consolidator. In the case of airline ticket refunds, this is normally 10-12 weeks from the point the tickets are submitted for consideration to the airline."*

“Please reply us back stating “I agree to go ahead with the cancellation of flights at the admin fee as mentioned in the e-mail”, if you wish to go ahead with the cancellation. Do mention the name(s) of the passengers clearly for whom you wish to cancel the reservation for. Kindly do CC your e-mail reply to (Firm C email) copied above. Once the refund application is validated by the airlines, we will send you the refund form which has to be signed by you. A scanned copy for the same has to be returned to us via email. Once the refund is validated by the airlines, it can take up to 2 weeks to get the refund from the airlines, so we request you to kindly send us the scanned refund form at the earliest possible to avoid delays.”

I appreciate that this email has been read differently and is considered to mean different things by different parties. However it is clear to me that there is no comment on this email showing as a matter of fact that Firm C had already been refunded by the airlines. Furthermore it is clear to me that any refund from Firm C is dependent on it being refunded by the airlines first. I've seen no persuasive evidence to show that as a matter of fact Firm C has been refunded by these airlines at any stage. And its terms make clear that it will not pay a refund until that has happened. So I'm not persuaded at this point that Firm C has breached its contract in relation to refunding Miss J.

I appreciate that the first quote of this email that I've quoted, particularly the first sentence thereof, is not as clear as it could be. And I can see why it in itself could cause confusion as to the situation. But I think when taking into consideration of the email as a whole and what Miss J is required to do I'm not persuaded Firm C has stated as a fact that it has been already refunded or that Miss J is guaranteed a refund by Firm C. To my mind it is clear that Miss J is required to act, then Firm C will act and then if Firm C receives the refund it will then make a refund to Miss J less its fees. And this is the service Firm C says it will provide, and I'm not persuaded there is a breach here which led to Miss J losing out for which Firm C and by extension NewDay are responsible for.

Miss J points to consumer legislation and states this means she is due a full refund for the flights not being provided. But as I've explained the airlines are responsible for the provision of the flights and not Firm C. Similarly it is the airlines that are responsible for complying with the terms of carriage that they operate under and not Firm C. And it seems clear that under those terms or local legislation there is no requirement to provide a refund and that a voucher/ability to rebook is all that they have to provide. And Firm C has put the ability to rebook to Miss J. And NewDay can only be held liable to a 'like claim' that Miss J would have against Firm C. It would be unfair for NewDay to be have greater liability than Firm C in such an instance.

So although NewDay are only partially correct in its approach to DCS I don't think Miss J has lost out as a result of NewDay's approach. I say this because although DCS is in place for the services Firm C provides I've decided that Firm C has not breached its contract with Miss J or materially misrepresented to her leading to detriment. And I do agree with NewDay that there isn't the required DCS relationship in place with regard to the airlines provision of either the flights or the refunds for cancelling the flights. And accordingly I've decided that this complaint shouldn't succeed.

For clarity's sake I'll now address the other key arguments Miss J makes as I see them.

Miss J often refers to what she purchased as being a “package”. To gain protection under the Package Travel Regulations (PTRs) what is purchased has to meet the strict definition of a “package” which contains a number of elements from a specified description of the constituents of a package. Having considered this carefully I'm satisfied that Miss J's collection of flights does not constitute a “package” under the PTRs.

Miss J says if airlines cancel flights you get a refund. And I agree that such terms are often found in airlines in this country and indeed across Europe. It isn't necessarily the case everywhere though, and I've not seen any persuasive evidence here that the airlines involved have acted contrary to their terms of carriage.

Miss J has stated that "*The airline stated to me they have approved the refund as they had cancelled the flights.*" I've not seen this and note that on file that there is evidence from two of the airlines saying there is no option of having a refund. And for the airline she names and says told her she could have a full refund the only item I evidence I have on file for them is an automated acknowledgement of her claim to it. I've not seen evidence it has said it has paid the refund to Firm C.

For NewDay to be liable here for the refund amounts the onus is on Miss J to show that Firm C has received the refunds and hasn't paid them on to her (less the admin fee). And I'm not persuaded that this has been demonstrated. It should be remembered that it is for Miss J to substantiate her 'like claim' against Firm C to NewDay and for NewDay to consider that fairly. I'm not persuaded it has been shown on balance that Firm C received the funds and it is only at that point would NewDay become liable for such funds. I invited Miss J to show that Firm C had received the funds in my provisional decision and Miss J did not do so. So I can only conclude that NewDay hasn't done anything wrong here.

Miss J points to the customer service provided by Firm C. NewDay aren't liable for this. It is only liable for breaches of contract or material misrepresentation. Miss J may feel that Firm C suggested or even told her she'd get a refund, but any such misinformation wouldn't be enough to make NewDay responsible for the refunds. NewDay would only be responsible if Firm C breached the contract it had with Miss J and I'm not persuaded this has been made out.

Miss J says her partner had booked mirroring tickets to hers at the same time through Firm C and his card provider has refunded him. This maybe the case. But firstly we only consider cases on their own individual merits. Secondly I should add that there are many different reasons for banks to refund consumers, including pragmatic approaches to such disputes and commercial reasons. Furthermore even though these disputes appear similar different businesses use different card schemes, which have differing rules and indeed different approaches to handling disputes. So I don't think this argument persuades me that my approach as delineated above is wrong.

So all in all having considered the matter I'm not persuaded NewDay has treated Miss J unfairly. I don't think the DCS relationship has been shown to be in place for the provision of the flights or any refund by the airlines involved. I'm not persuaded that Firm C has breached the contract or misrepresented the matter materially. And Miss J was out of time in relation to having a chargeback raised. So I don't think NewDay has done anything wrong here which needs remedy. Consequently I have decided that this complaint shouldn't succeed.

My final decision

For the reasons set out above, I do not uphold the complaint against NewDay Limited. It has nothing further to do in this matter.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss J to accept or reject my decision before 8 December 2022.

Rod Glyn-Thomas
Ombudsman

