

The complaint

Mr S and Mr H are business partners for C. They complain that PayrNet Limited won't refund a transaction they didn't make.

ANNA Money, who Mr S and Mr H's account is with, is an agent for PayrNet. For ease, I'll mainly refer to ANNA throughout the decision.

What happened

Mr S was called by someone claiming to be from ANNA about some unusual transactions on C's account. They asked him for a code sent by text message to prove who he was, which he shared with the caller.

Afterwards Mr S realised it was for a card payment for £1500.00 and contacted ANNA to stop it. It couldn't do this and declined C's claim for a refund and subsequent complaint. Unhappy, C brought its concerns to our service to investigate.

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 done so, I've reached the same outcome as our investigator for these reasons:

- In line with the Payment Services Regulations 2017 (PSRs), C isn't liable for payments Mr S didn't authorise, unless he failed with gross negligence or intent to comply with the terms of the account or keep C's personalised security details safe.
- I've firstly considered whether Mr S authorised the payment in dispute. The PSRs explain a payment is to be regarded as authorised if he consented to it – and that consent must have been given in the form, and in accordance with the procedure, agreed between ANNA and C.
- ANNA has highlighted the following terms from its agreement that explain the form and procedure: *"Each transaction will need to be authorised by the Cardholder. We will treat the transactions as authorised and genuine if the Card PIN or other security code personal to the Cardholder is used and, where prompted by ANNA, authenticated by the Cardholder through 3DS."*
- ANNA's submitted that the steps were followed in this case and the one time passcode (OTP) sent by text message is a form of consent. But the terms are clear that the transactions needs to be authorised by the *Cardholder*. Here it's accepted Mr S shared the OTP with the caller under the guise of proving who he was. But I've not been persuaded that he entered the code and therefore authenticated the transaction by 3DS on the merchant's website. Nor do think it's likely that he entered his card details. Instead, I think these steps were completed by the fraudster, without Mr S's knowledge.

- It follows I'm not persuaded Mr S consented to this payment in accordance with the agreed form or procedure. So I consider it to be unauthorised.
- I've gone on to consider whether Mr S failed with gross negligence to comply with the terms of the account and to keep C's personalised security details safe. ANNA has submitted a definition for gross negligence but it's not said where it's from. And the concept isn't defined in the PSRs. Saying that, there are sources that help to guide our understanding and application.
- The FCA, in its document setting out its role under the PSRs, says: "... we interpret *"gross negligence"* to be a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness." A similar test existed historically through the Banking Code. Case law is helpful here too. In a commercial contract context, *Tankers Ltd v Papachristidis* says that conduct undertaken with *"actual appreciation of the risks involved"*, or *"serious disregard of or indifference to an obvious risk"* can amount to gross negligence.
- Taking this all into account, and having reviewed the circumstances of the case carefully, I'm not convinced Mr S failed with gross negligence. I'll explain why.
- I think it's likely the caller already had Mr S's card details. It's not been suggested he shared these during the call, and we know there are lots of way fraudsters manage to get hold of these details. Indeed, I've noted C had recently had trouble with a new merchant it had paid but hadn't goods from, which might have been connected.
- As is typical in these sorts of scams, I think it's likely the fraudster would've used their knowledge of the card details to convince Mr S they were genuinely calling from ANNA. With that in mind, I can see why Mr S trusted the caller and how he would've been worried when they told him there were unusual transactions on C's account.
- They asked him for a code they sent by text message to confirm who he was so they could protect the account. The message said: "`<code>` is the code to complete your 1,500.00 GBP [merchant] purchase made with the card ending in ****. Don't share this code with anyone"
- Mr S said he it was only afterwards that he realised the OTP was for a payment. And I can understand how that happened. Mr S was acting in the heat of the moment, having been convinced he needed to protect C's account. And he'd been primed to expect the code from someone he genuinely believed was from ANNA – and the code subsequently came from them. In these circumstances, I can see how Mr S focussed on the code and simply shared this, particularly when it appeared first in the message. I don't think it means he acted with very significant carelessness to conclude that he failed with gross negligence.
- It follows that I'm not persuaded C is liable for this transaction and ANNA needs to put things right – by refunding C's losses from this unauthorised transaction.
- ANNA submit that it'd be punitive to award interest on top of this. But its obligations are clear in the PSRs, which says it should've restored C's account by the end of the next working day at the latest. So I'm satisfied it's fair to also award 8% simple interest per year on the amount to compensate C for the time it's been out of pocket.

My final decision

For the reasons I've explained, I uphold C's complaint. PayrNet Limited must:

- Pay C the total of the unauthorised transaction, less any amount recovered or already refunded – I understand this to be £1,500.00.
- Pay 8% simple interest per year on this amount, from the date of the unauthorised transactions to the date of settlement (less any tax lawfully deductible).

Under the rules of the Financial Ombudsman Service, I'm required to ask C to accept or reject my decision before 23 March 2023.

Emma Szkolar
Ombudsman