

## **The complaint**

Mr S complains about how NewDay Ltd (“NewDay”) responded when he asked it to help him obtain a refund of a fee he paid using his NewDay credit card.

## **What happened**

Mr S bought airline tickets using a credit card provided by a third party bank I will call “H”. Mr S bought the tickets from a travel agency I will call “O”. However, after the purchase Mr S realised he needed to amend the booking. O said in order to do this Mr S would have to pay it a fee of £491.60, Mr S paid the fee to O.

Subsequently Mr S checked with the airline. It told him it had amended the tickets without charging a fee. Therefore, Mr S considers that no fee should have been requested and taken by O. Moreover, Mr S also considers that O gave him incorrect information on which he relied to his detriment as he thinks no fee was necessary. In other words, Mr S considers that O misrepresented the situation to him Therefore Mr S wants all of the £491.60 back.

Moreover, due to the type of credit Mr S used to purchase the tickets he thinks he is entitled to bring a like claim for misrepresentation against NewDay as he could against O. Therefore Mr S complained to NewDay on this basis and asked for a full refund. But NewDay rejected Mr S’s claim on what Mr S sees as spurious grounds. As a result, in addition to the £491.60 Mr S asks for compensation for *“mental stress and effort and time being used to recover my money back”*.

NewDay considers that it had two potential routes open to it in order to try to reimburse Mr S’s money. Namely a claim against itself for misrepresentation under Section 75 of the Consumer Credit Act 1974 (“Section 75”) or a claim ultimately against O, under a process known as chargeback. But it concluded in this instance neither option could assist Mr S.

That said, NewDay accepts, that on one occasion, it did not handle responding to Mr S as well as it should have done, therefore it credited his account with £40 to make up for this.

Mr S rejected NewDay’s response, and because he remained dissatisfied, Mr S complained to our service.

One of our investigator’s looked into Mr S’s complaint. Our investigator did not recommend that Mr S’s complaint should be upheld.

NewDay did not respond to let us know if it accepted our investigator’s recommendation, but Mr S did respond to reject it. In summary, Mr S told us that O had got the amount of the fee wrong the fee should have been £364.20 not £491.60. Both he and O agreed on this point. O had promised to refund the £127.40 but despite this promise it had not refunded the money. Therefore Mr S is entitled to claim the £127.40 from NewDay instead. Moreover, he only claimed the full £491.60 because NewDay told him to do this.

Mr S asked that an ombudsman review his complaint

## **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.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. Rather, I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

Mr S has now also raised a new complaint about O failing to refund him £127.40 as it promised to do. Further it appears in this new complaint both Mr S and O both accept that O was entitled to charge Mr S for the amendments to the tickets, so the charging of a fee is not in itself in dispute. Rather the issue is O's failure to refund the part of the fee that amounted to an overcharge. This appears to be an entirely new matter and has not been considered by NewDay in its final response to Mr S or investigated within this complaint. Neither is it the complaint Mr S made when we asked him specifically if we had understood his complaint. It follows that I am unable to look at this matter in this decision. I will therefore only look at Mr S's original complaint that O charged him for amending his tickets when it should not have charged any fee at all for this because the airline amended the tickets for free and therefore Mr S is entitled to a refund of £491.60.

Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulator's rules, guidance and standards and codes of practice and (where appropriate) what I consider to have been good industry practice at the time.

The finance agreement, that is the credit card agreement, in this case is a regulated consumer credit agreement. As such this service is able to consider complaints relating to it.

Further, Mr S used his credit card to make the payment to O. Because he used this type of credit he potentially has the protection afforded to debtors against creditors under section 75.

The general effect of section 75 is that if Mr S has a claim for misrepresentation or breach of contract against the supplier he can also bring a like claim against NewDay provided certain conditions are met. One of these conditions is that there must be a specific type of agreement in place known as a debtor-creditor-supplier agreement. NewDay said there was no such agreement in place as the supplier was the airline. But I think NewDay has misunderstood the complaint on this point. Mr S complains about a misrepresentation made by O about the service it was going to supply not the service the airline was going to supply. So O is the supplier for this complaint. This is why I am satisfied there is a relevant debtor-creditor-supplier agreement in place that would permit Mr S to rely on section 75 in his claim against O.

Therefore if I was satisfied that Mr S had a claim for misrepresentation or breach of contract against O, I'd say it was fair and reasonable that NewDay had to take responsibility for this and put things right. It follows I am going to look at whether O's representation amounted to a misrepresentation or a breach of contract.

In this context misrepresentation means a false statement of fact that induced Mr S to enter into the contract. There's an initial difficulty here because Mr S had already entered into the contract with O for the purchase of the tickets so on the one hand I could say that nothing O said about the need to pay the fee could have induced Mr S to enter into that contract so I've

no fair or reasonable basis for saying NewDay has to take any responsibility for misrepresentation because there was none. This is because the representation was made after the formation of the contract.

That said, I don't know enough about the process behind the amendment of the tickets to know whether it was merely a variation of the original contract or if in the alternative, it required a whole new contract to be created between Mr S and O.

However, even if I took an alternative view and said that the contract here is a new one, namely a contract to take the actions necessary to amend the tickets, it does not get Mr S much further. I recognise that Mr S's position is that since the airline told him that it did not charge him to make the amendments then O gave him false information when it said a fee had to be paid. It is not clear enough though what representation O actually made, it could have said it was going to charge Mr S because the airline would be charging a fee, which on the face of it would appear to be false. But even this on balance I could not say was enough as I don't know if the airline never intended to charge a fee or merely waived it in this instance. But O could just have said it was charging the fee because it was entitled to so when an amendment is made which would appear to be true when I look at O's terms and conditions. Mr S accepted these terms and conditions when contracting with O. In the circumstances, I cannot safely say O's representation was a misrepresentation. It follows I have no fair or reasonable basis to uphold this part of Mr S's complaint.

Mr S complains about misrepresentation not breach of contract, but I think it is appropriate given my inquisitorial remit to look at this too given the facts of this complaint. But again this does not assist Mr S because as I have already mentioned the relevant terms and conditions permit O to charge for amendments. Therefore I don't find that by charging the fee O breached any contract it had with Mr S. It follows I've no fair or reasonable basis to uphold this part of Mr S's complaint either.

### **Chargeback**

Throughout Mr S has talked about his rights under section 75. But I think NewDay acted correctly when it considered chargeback as well as section 75 as both, potentially, could have helped Mr S get his money back, which is what he wanted.

As Mr S paid for the goods and services using his credit card and wanted a refund, I've thought about whether NewDay dealt with his request fairly. The chargeback process is relevant in this case. This is a way in which payment settlement disputes are resolved between card issuers and merchants. They are dealt with under the relevant card scheme rules.

The chargeback system does not give consumers legal rights. But we consider it good practice for a financial business to raise a chargeback where there is a reasonable prospect of it succeeding. If I am to order NewDay to refund all of the fee to Mr S, I must be satisfied that it acted incorrectly, in relation to the chargeback.

A chargeback can only succeed to the extent there is a valid chargeback reason as set out in the relevant card scheme rules. And here, there was no such chargeback reason that could have applied in these circumstances. Therefore on balance any chargeback would have had no reasonable prospect of success.

It follows from what I've said above I've no fair or reasonable basis for saying NewDay acted incorrectly in relation to this part of the complaint. Therefore I don't uphold this part of the complaint.

### ***Distress and inconvenience***

NewDay paid Mr S compensation for the service issues it highlighted. Mr S asks for further compensation as he indicates NewDay has not paid him enough for “*mental stress*” caused by the complaint and the “*time*” and “*effort*” he has put into getting his money back. But in the circumstances I think the £40 NewDay has paid Mr S goes far enough based on the information I’ve got. I can’t fairly say it acted in such a manner that I think it caused unavoidable distress and inconvenience that would merit a larger award.

Mr S indicates O’s customer service has been below par too. But I’ve no proper basis to hold NewDay to account for O’s customer service failures. For all of these reasons it follows I don’t uphold this part of his complaint.

### **My final decision**

My final decision is that I don’t uphold this complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr S to accept or reject my decision before 24 April 2023.

Joyce Gordon  
**Ombudsman**