

Complaint

Mrs W is unhappy that Barclays Bank PLC (“Barclays”) closed her account and recorded a fraud prevention marker against her.

Background

In July 2020, Mrs W’s Barclays account received a number of payments from a third-party. Barclays subsequently received a notification from the third-party bank (which from this point onwards, I’ll refer to as X) which sent the funds, stating that its customer had been scammed into making these payments into Mrs W’s account. Barclays reviewed Mrs W’s account and as a result of its investigation, decided to close Mrs W’s account and record a fraud prevention marker.

After learning that Barclays had recorded a fraud prevention marker against her, Mrs W complained to Barclays. Barclays looked at Mrs W’s complaint and didn’t uphold it. As Mrs W remained dissatisfied, she referred the matter to our service.

One of our adjudicators looked into Mrs W’s concerns. She didn’t think that Barclays had done anything wrong or acted unfairly. Mrs W didn’t agree and asked for an ombudsman to consider her complaint.

My provisional decision of 23 January 2023

I issued a provisional decision – on 23 January 2023 - setting out why I was intending to uphold Mrs W’s complaint. I won’t copy that decision in full, but I will instead provide a summary of my findings.

I started by explaining that the marker Barclays filed is intended to record that there was a ‘misuse of facility’ – relating to using an account to receive fraudulent funds. In order to file such a marker, Barclays isn’t required to prove beyond reasonable doubt that Mrs W is guilty of a fraud or financial crime, but it must show that there are grounds for more than mere suspicion or concern. The relevant guidance says:

- *“There must be reasonable grounds to believe that an identified fraud or financial crime has been committed or attempted; [and]*
- *The evidence must be clear, relevant and rigorous such that the member could confidently report the conduct of the subject to the police.”*

I then went on to explain that in practice this means that Barclays had to first be able to show that fraudulent funds entered Mrs W’s account, whether they were retained or merely passed through. Secondly, Barclays also needed to have strong evidence to show that Mrs W was deliberately dishonest in receiving the fraudulent payment and knew it was, or might be, an illegitimate payment. This could include Mrs W allowing someone else to use her account in order to receive an illegitimate payment. But a marker shouldn’t be registered against someone who was unwitting; there should be enough evidence to show complicity.

To meet the standard of proof required to register a fraud marker, the bank had to carry out checks of sufficient depth and retain records of these checks. This should include giving the account holder the opportunity to explain the activity on their account in order to understand their level of knowledge and intention.

This meant that in order to determine Mrs W's complaint, I needed to decide whether I think Barclays had enough evidence to show fraudulent funds entered Mrs W's account and that she was complicit in this. Barclays had to have enough evidence to meet both parts of test for it to have acted fairly and reasonably.

Having considered matters, it was clear that Barclays received a fraud notification regarding a number of payments made into Mrs W's account. So I could understand why Barclays had concerns about the usage on Mrs W's account.

The terms and conditions of Mrs W's account permitted Barclays to close it without notice in certain circumstances. These included where it had "*reasonable grounds for thinking*" a customer "*commit(ted) (or attempt) fraud against us or someone else*". Given Barclays had received a notification from X stating that fraudulent funds had found their way into Mrs W's account, I thought that Barclays was, at that stage, reasonably entitled to suspect fraud *may have* taken place and legitimately entitled to reach the conclusion that there was an immediate risk in keeping Mrs W's account open. Therefore, I thought that Barclays was entitled to close Mrs W's account in the way that it did.

That said, even though Barclays may have had reasonable grounds for concern about Mrs W's account usage and this was enough to justify its closure, I didn't think that it automatically followed that Barclays was entitled to register a fraud prevention marker. Barclays believed X's fraud notification was enough to conclude that fraudulent activity took place. It also questioned what else would we expect it to review in order to conclude that fraud took place.

However, I explained that a fraud report wasn't in itself enough to register a fraud prevention marker against a customer. A bank also needed to investigate veracity of any fraud report received and also produce sufficient evidence to show that a customer was complicit in any fraudulent activity. And I didn't think that Barclays had done this here as I thought that there were a couple of things that didn't quite add up in the fraud allegation made by X's customer.

I thought this was the case because the notification received from X indicated that its customer reported having transferred the funds to Mrs W's account after speaking with people on social media who offered her a return of £10,000.00 if she invested with them. However, the payments reported as being fraudulent weren't the only payments made from X's customer's account to Mrs W's account. There were other payments made - totalling an amount which was more than the reported transactions - a couple of days before.

Given the proximity of the unreported transactions to the reported ones and the fact that the notification was also made so soon afterwards, I found it strikingly odd that the person who reported the fraud didn't report the earlier transactions. I couldn't see a reasonable explanation why X's customer would report some transactions and not other higher value ones in circumstances where they said they believed they were tricked into making payments to someone for investment purposes. I found it difficult to believe and accept that they would have forgotten about the earlier payments too.

I also found Barclays' comments in relation to need the need to direct any questions regarding the unreported transfers to X to be incredibly disappointing. This was information it should have obtained at the time and certainly before deciding it had enough to record a fraud marker against Mrs W in the first place.

Furthermore, I also struggled to understand why X's customer used the reference 'owed' when making these payments, as well as the unreported ones. This reference didn't really tally with someone making transfers for investment purposes. Barclays questioned whether Mrs W had provided evidence to demonstrate that she lent X's customer money. But I thought that this ignored the fact that it wasn't for Mrs W to disprove Barclays' conclusions. It was Barclays' responsibility to demonstrate that fraudulent activity took place and that Mrs W was complicit in this.

And having thought about matters, I was minded to conclude that Barclays had failed to do that. Barclays needed to have relevant and rigorous evidence such that it could report the matter to the police. Simply pointing out that it had received a fraud notification, from X, that fraudulent activity took place, especially in circumstances where the available evidence calls into question the plausibility of the fraud allegation - just wasn't enough to meet what is a high bar.

So overall and having considered everything, I was minded to find that Barclays didn't have sufficient evidence to meet the test for recording a fraud marker against Mrs W. In my view, the evidence Barclays relied on didn't clearly demonstrate that Mrs W's account was in receipt of fraudulent funds. This left me intending to uphold Mrs W's complaint and directing Barclays to remove any and all fraud markers it had recorded against her.

Responses to my provisional decision

Mrs W didn't provide anything further in response to my provisional decision.

Barclays responded to my provisional decision saying that it had been in contact with X and it had confirmed that it refunded all of the transfers its customer made to Mrs W's account. This included refunding the transactions which weren't included on the fraud report.

Furthermore, it didn't think that the use of the reference owed was a reason to remove the fraud marker. In its view, such references are often used to deter banks from looking into fraudulent payments. It asked us to obtain evidence that Mrs W lent X's customer funds and as this hasn't been received, it's fair to assume that the payment reference that was used, was used in order to deter the bank from uncovering the scam. As this is the case, it wasn't comfortable removing the fraud marker.

My findings

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

I've considered Barclays' further comments. But in truth I don't think that these comments have really added anything new. It still appears to be arguing that as X has concluded fraud took place, it's for Mrs W to disprove that fraud took place. X may have refunded all the payments to its customer but this still doesn't explain why the earlier payments weren't reported as being fraudulent.

Furthermore, while I accept that alternative references are sometimes used to disguise fraudulent payments, the facts and circumstances of this case – especially the nature of the allegation of fraud made - haven't persuaded me that's what happened here. And I certainly don't think it fair and reasonable to record a fraud marker based on an assumption that fraud took place.

As I've said throughout this decision, it is for Barclays to prove that Mrs W was complicit in fraudulent activity. It isn't for Mrs W to disprove this. And I remain satisfied that Barclays hasn't done enough to meet the high evidential bar in this case. Accordingly while I appreciate that Barclays may not feel comfortable removing the fraud marker, that's precisely what I'm requiring it to do here.

So overall and having considered everything, including Barclays' further response to my provisional decision, I've not been persuaded to alter my conclusions. And I'm still upholding Mrs W's complaint.

My final decision

For the reasons I've explained above and in my provisional decision of 23 January 2023, I'm upholding Mrs W's complaint. Barclays Bank PLC needs to remove any and all fraud markers it has recorded against Mrs W.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 28 February 2023.

Jeshen Narayanan
Ombudsman