

The complaint

Mr E complains Santander UK Plc (“Santander”) unfairly registered a fraud marker against him.

What happened

In May 2021, Santander received a fraud report from a third-party bank relating to one of its customer’s accounts, for a payment made from it into Mr E’s account. Santander placed Mr E’s account under review and asked him for proof of entitlement to several payments made into his account.

After speaking to Mr E about this, Santander wrote to Mr E and told him it was closing his account down immediately. Around the same time Santander also applied a CIFAS (Credit Industry Fraud Avoidance System) ‘misuse of facility’ marker against him. Mr E says he found out about this several months later, after which he complained.

In its final response, Santander said it acted properly in closing Mr E’s account and in applying the CIFAS marker. Unhappy with this, Mr E referred his complaint to this service. One of our Investigator looked into it. Initially they said the complaint should be upheld as they thought Santander had not applied the marker fairly.

In short, they said this because - based on the information available at that time – they thought Mr E had naively trusted someone they’d known for long time to use their account. So, they thought Mr E had been the unwitting victim of receiving funds from an illegitimate source. They also recommended Santander pay £100 compensation for the distress and inconvenience the matter caused him.

Mr E accepted this, but Santander did not. It made further representations on which our Investigator changed their mind and said Mr E’s complaint shouldn’t be upheld. In other words, Santander had applied the marker fairly.

In summary the key points they made were:

- Santander has provided a call recording when it called Mr E to ask where the funds came from and what they were intended for. Mr E informed Santander the funds were intended to pay his rent and were from his sponsor, via a friend of his sponsor. Mr E also stated he borrowed money from his friend to pay his rent and then transferred the funds he received to pay her back. Mr E told our service he received the funds for his friend
- But Mr E had told this service he’d received a large payment from his friend, Miss O, as they’d lost their bank card and wanted him to hold it for safe keeping until they got a new card. And that the same friend, during this time, asked him if they could get someone to send him money from their family. This money of around £14,000 was then sent back to the friend three days later when they’d sorted their banking issue out

- Our Investigator found Mr E had given conflicting information about the funds to this service and Santander. So they didn't think Mr E was being honest about where the funds came from and what they were intended for

Mr E did not agree with what our Investigator said. I'd like to assure Mr E that I've carefully read everything he's said in response to our Investigator's view, even if I don't expressly set it out here. No discourtesy is intended by me in taking this approach. 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.

Some of the key points Mr E has made are:

- Their third-party bank statement shows they transferred £1,000 to their friend account on the same day it was received. All funds he'd received were from his friend, Miss O. To the best of his knowledge all the funds he received were legitimate – and were intended for Miss O
- As the call with Santander happened around two years ago, he can't recall details of it. But it was unscheduled and was the only time Santander contacted him about this matter. His bank apps were frozen so he couldn't refer to the transactions, nor reference his statements, which made his responses understandably unsatisfactory
- His answers show he was unsure about the transactions referred to, and such lump sums are normally sent by his educational sponsors – which at times meant he received from unknown individuals given the difficulties with sending international payments from his home country
- There are several transactions with Miss O – and they have borrowed and lent money to each other on many occasions. So they assumed it was one of these transactions Santander was asking about on the phone call
- He is a law-abiding, honest and hardworking citizen and has always lived on legitimate funds. And he has shown beyond reasonable doubt that the funds were intended for Miss O, and they came into his account because of a security issue with her account after which he quickly sent the funds back
- He agrees the information he initially provided Santander about the source of funds was inaccurate, but he has since made several attempts to correct this by sending evidence related to messages, account statements and a letter from Miss O
- Mr E said the funds were from his educational sponsor, via an unknown friend of the sponsor, for his rent because he was asked why he was receiving large sums of money from people he didn't know. Both his accounts were frozen, and he didn't want to get into trouble. Nor did he think the funds were from a questionable source, and he assumed the issue was with the size of the transactions and people unknown to him sending them
- His reluctance on the phone with Santander's agent was not an attempt to conceal illicit activity, he was simply trying not to get into trouble for the volume of funds entering his account. And he came 'clean' and put forward evidence supporting his innocence as soon as Santander mentioned there was an issue with his funds

As Mr E hasn't agreed with what our Investigator said, his complaint has now been passed to me – an Ombudsman – to decide.

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 decided not to uphold Mr E's complaint. I know this will disappoint him, so I'll explain why.

The marker Santander have filed with CIFAS is intended to record there's been a 'misuse of facility' – relating to using the account to receive fraudulent funds.

In order to file such a marker, Santander's not required to prove beyond reasonable doubt Mr E is guilty of a fraud or financial crime, but they must show there are grounds for more than mere suspicion or concern. CIFAS 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”*

What this means in practice is that a bank must first be able to show fraudulent funds have entered Mr E's account, whether they are retained or pass through the account. Having looked at the information Santander have given me; I'm satisfied fraudulent funds entered Mr E's account.

Secondly, Santander will need to have strong evidence to show the consumer was deliberately dishonest in receiving the fraudulent payments and knew it was, or might be, an illegitimate payment.

A marker shouldn't be registered against someone who was unwitting; there should be enough evidence to show deliberate complicity. So, I need to consider whether Santander has enough evidence to meet the standard of proof and load a marker for a misuse of facility with CIFAS.

Mr E says he has always acted in good faith and has effectively been an unwitting victim here as he allowed Miss O to use his account whilst she sorted out her debit card issue. The crux of this complaint therefore falls on whether I'm persuaded Mr E was most likely deliberately complicit or whether he was unwitting.

Having listened to Mr E's conversation with Santander when questioned about payments into his account, and what he told this service happened, I'm satisfied that they are substantially inconsistent. Because of this Mr E's credibility is called into question.

I note Mr E accepts he was contradictory and has put forward mitigation for this. Namely, that he wasn't trying to obfuscate the truth, but that he was trying not to get into trouble for the size of transactions entering his account. He adds that he was receiving large sums from unknown individuals due to problems with getting money sent over internationally and as his account was frozen, he couldn't check the transactions.

I've carefully considered everything Mr E has said but having done so I'm not persuaded Mr E was unwitting to the fraud. I say that because I find it difficult to accept he had only given Santander inaccurate and misleading information as he was worried about getting into trouble.

If Mr E had nothing to hide, he had no other reason than tell the truth when Santander spoke to him. The fact he has been inconsistent, and somewhat evasive lends to the conclusion that he was deliberately concealing something he knew was improper or illicit.

I note what he's said in mitigation but given the evidence, I'm persuaded to put more weight on him being deliberately inconsistent – and that he was most likely therefore concealing something he knew was wrong, and therefore he was witting. After all, if your account is frozen, and you're being asked questions about transactions, you would naturally understand the importance of being honest.

So it follows that I'm persuaded Santander applied the marker fairly.

Mr E says Santander didn't do enough by way of contacting him to carry out its investigation fairly. I've seen a letter Santander sent to him in May 2021 in which it told Mr E his account had been blocked and for him to contact it. Santander also called Mr E to ask about the transactions. Given Mr E accepts he wasn't telling the truth here, and having heard the content, I'm satisfied that at that point Santander had enough information to have applied the marker. What Mr E said was implausible and evasive – and as it wasn't the truth, it's not difficult to see why Santander had cause for concern and applied the marker.

Mr E hasn't complained about his account being closed, so this isn't something I've considered here. Mr E has suggested in one of his representations that he has been treated differently by Santander due to a protected characteristic. But I haven't seen anything that shows he was treated differently because of a protected characteristic.

My final decision

For the reasons above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr E to accept or reject my decision before 9 June 2023.

Ketan Nagla
Ombudsman