

The complaint

Mrs S complains that Tesco Personal Finance PLC trading as Tesco Bank hasn't dealt fairly with a claim she brought against it under the connected lender liability provisions of section 75 of the Consumer Credit Act 1974 ("section 75") after her gym membership stopped.

Background to this decision

I recently issued my provisional decision setting out the events leading up to this complaint and my intended conclusions on whether I could deal with the dispute between Mrs S and Tesco Bank. I've reproduced that provisional decision here and it is incorporated as part of my overall findings. I invited both parties to let me have any further comments they wished to make in response, and I will address their responses later in this decision.

What happened

In 2019 Mrs S took out a three-year membership to a local gym. Under an incentive being run at the time, Mrs S was to pay one year's membership and receive the other two years free. She paid £599 using her Tesco credit card.

Unfortunately, after a few months the gym became unavailable for her use – firstly due to the impact of the Covid-19 pandemic, and later because the gym ceased trading. The liquidators indicated there were unlikely to be sufficient funds to pay creditors. So Mrs S turned to Tesco Bank to make her claim, noting that she would effectively miss out on around 28 months of membership.

Tesco Bank accepted that Mrs S had a valid claim in breach of contract. The bank said it was only liable for Mrs S's financial loss, which it assessed as £200 being the unused portion of what she'd paid. Mrs S is unhappy with the bank's proposal, as she maintains she had a three year membership.

Our investigator thought Tesco Bank had made a fair offer to settle Mrs S's claim. But Mrs S didn't agree. She's asked for this review.

What I've provisionally decided – and why

Tesco Bank has accepted that Mrs S has a claim in breach of contract and the relevant requirements of section 75 apply to the transaction. For the sake of completeness, I share this view. The key issue in dispute here isn't whether there's been a breach, or whether Tesco Bank has a liability to Mrs S as a result. Rather, it's about the extent of that liability; in simple terms, the amount Tesco Bank should pay Mrs S to deal with that liability.

I understand Tesco Bank's point that Mrs S was due to receive two years free membership. But I don't find it a particularly persuasive argument. I consider the bank has adopted the wrong approach in calculating suitable redress by excluding the latter two years on the basis they were free. They still formed part of the overall consideration that the gym brought to the contract with Mrs S.

It's accepted by all parties that the bargain between Mrs S and the gym was that she would pay £599, in return for which she would be able to use her membership for three years. These are undoubtedly core terms of the contract. Mrs S performed her part of the bargain by paying the amount in question. The gym has only partially performed its obligation. The contract was disrupted by Covid, but the main reason the contract hasn't been performed is because the gym ceased trading. It seems likely to me that this would be viewed as a fundamental breach of contract.

I accept Mrs S's position that this means she's lost out on 28 months of gym membership she fully anticipated (and was entitled to expect) to receive in return for the money she paid. There's a range of remedies Mrs S might be able to seek in relation to that loss. For example, if she's had to buy an alternative gym membership for that remaining period, that could form part of a damages claim against Tesco Bank. She could seek specific performance, though this is unlikely to be an appropriate remedy where the gym is not longer trading and the claim is being brought against a finance provider.

The most likely (and I think the most appropriate) remedy open to Mrs S is to recover money she paid where the consideration for payment of the money has failed. This is what she's seeking and is consistent with provisions in section 54 of the Consumer Rights Act 2015 ("CRA").

Having concluded that the consideration Mrs S was to receive in return for the money she paid was the full three years of membership, and that this consideration failed with 28 months remaining, I consider it would be more appropriate for Tesco Bank to pay redress based on the full term of the contract, rather than just the first 12 months.

I'm minded that the clear explanation of her claim Mrs S has provided from the outset, along with her rights under the CRA, ought to have suggested to Tesco Bank that it should have taken this stance. The way the bank approached the claim didn't demonstrate it gave sufficient weight to these aspects. That has both delayed Mrs S receiving the appropriate refund and caused her unnecessary inconvenience in her dealings with the bank, for which I intend to award interest and compensation along the lines set out below.

1. pay Mrs S £465 to reflect the loss of her gym membership for the remaining 28 months of the contract
2. pay interest on this amount at 8% simple annually from 28 May 2021 (being the date on which Tesco Bank issued its response to Mrs S's claim) until the date it pays this settlement. If Tesco Bank deducts tax from the interest element of my award, it should confirm to Mrs S that it has done so and provide her with the relevant tax deduction certificate
3. pay Mrs S £100 in recognition of the distress and inconvenience she was caused by the way in which Tesco Bank dealt with her claim

Responses to my provisional decision

Mrs S accepted my intended conclusions and had no further comments to make. Tesco Bank also responded, making the following points:

"Mrs S's receipt confirms clearly she has paid for 1 YEAR and 2 free, if the wording had been different we would have taken a different approach

Only a judge/ court of law can decide whether Tesco Bank hasn't fulfilled it's obligation under the CRA and Section 75 so providing compensation for delays and inconvenience is excessive considering the 8% statutory award is being offered, to include the period of 2 years that held no value

On balance, our Section 75 team, complaints team, and the FOS investigator all believed we had offered a fair remedy, so cannot agree insufficient weight was given to the claim

Finally I don't understand the Ombudsman's calculation for a refund as Mrs S paid £599, we have covered £200, if we provide £465 she is being refunded more than the contract price."

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 haven't seen any persuasive reason to reach any different findings or to change the proposed outcome. In light of Tesco Bank's comments in response to my provisional decision, however, I think it's appropriate to make the following observations.

When determining a complaint under our compulsory jurisdiction, I have a statutory obligation to do so by reference to what's fair and reasonable in all the circumstances of that complaint¹. As set out in our rules², in considering what's fair and reasonable in all the circumstances of a case, I need to take into account (among other things) relevant law and regulations.

When dealing with a complaint about the way in which a card provider has responded to a claim made under section 75, one of the things we need to consider is how that card provider has addressed any potential liability it might have. In this case, Tesco Bank's potential liability arises under the contract between Mrs S and the gym, into which are implied certain provisions under the CRA. It follows that there are circumstances in which we will need to consider the obligations and remedies available to a consumer under the CRA.

In my provisional decision I sought to highlight some basic contractual points. One of those was around the consideration brought to the contract by Mrs S and by her gym. I will reiterate those here, in the hope it will assist. Mrs S paid the gym £599. In return, the gym promised her three years of membership. The fact that Mrs S paid the same amount for three years' membership as she would have for one year doesn't change what the gym was obliged to provide to her.

The gym hasn't provided Mrs S with three years' membership (or even one year), as she was entitled to expect by paying the sum she paid. The remedy Tesco Bank proposed places no material value on the additional two years that Mrs S contracted to receive; a point Mrs S pointed out to the bank on more than one occasion.

All of this was known to Tesco Bank from the outset and ought to have caused it to have taken a different approach. The failure to do this – or to reconsider its position in light of Mrs S's submissions – led to Mrs S being deprived of the use of money she should more properly have been refunded straight away. That is why I consider the fair and reasonable way to resolve matters involves more appropriate redress for the breach of contract, interest on that sum for the time Mrs S has been deprived of that redress, and compensation for her distress and inconvenience caused by the bank's handling of her claim.

On the subject of that redress, I believe I made clear to Tesco Bank the basis on which I'd specified it should be calculated. In case there is any residual confusion, the £465 proposed

¹ see Section 228(2) of the Financial Services and Markets Act 2000 (as amended)

² see Financial Conduct Authority (FCA) Handbook - DISP 3.6.4R

is not in addition to the £200 Tesco Bank suggested as settlement. I specified this amount because to my knowledge, the £200 is an amount Tesco Bank offered, rather than an amount it has actually paid. I trust this clarifies the bank's understanding.

Tesco Bank's point about the views of its internal departments and our investigator don't change this. The purpose of an ombudsman's review of a complaint is not to endorse a position previously taken. Rather, it is a full review process – available to both parties to a complaint – enabling matters to be looked at afresh. In some cases that process will result in a different outcome, which might identify shortcomings not previously noted. That is what has happened here.

My final decision

For the reasons I've explained here and in my provisional decision, my final decision is that I uphold this complaint. To settle it, I direct Tesco Personal Finance PLC trading as Tesco Bank to take, within 28 days of receiving Mrs S's acceptance of this decision, the steps set out below.

1. pay Mrs S £465 to reflect the loss of her gym membership for the remaining 28 months of the contract. Tesco Bank is entitled to deduct from this amount any sums it has already refunded to Mrs S in respect of her breach of contract claim
2. pay interest on the amount in 1. at 8% simple annually from 28 May 2021 (being the date on which Tesco Bank issued its response to Mrs S's claim) until the date it pays this settlement. If Tesco Bank deducts tax from the interest element of my award, it should confirm to Mrs S that it has done so and provide her with the relevant tax deduction certificate
3. pay Mrs S £100 in recognition of the distress and inconvenience she was caused by the way in which Tesco Bank dealt with her claim

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

Niall Taylor
Ombudsman