

The complaint

Mr K has complained that HSBC UK Bank Plc won't refund a transaction he says he didn't make or otherwise authorise.

What happened

In late 2021, Mr K's mobile banking was used to pay £8,000 to a third party.

Mr K said he didn't authorise this payment. He explained he'd been at a bar, had been using his phone, and had spoken to a man for some time. Eventually, the man hugged him and then left in a hurry. Mr K then noticed he'd been pickpocketed, but the man had gone and security wouldn't help. He reported this to the police and replaced his phone, passport, and driver's licence. He tried to phone HSBC a number of times but they were always busy, and when he finally got through he found out about the transfer. Mr K explained he'd kept his online banking security details on a notes app on his phone, but he hadn't thought the fraudster would be able to access it as his phone was protected with a passcode.

HSBC held Mr K liable for the payment in dispute. They felt this was a police matter. They didn't see how a thief could've accessed Mr K's mobile banking, they pointed out that Mr K had rung them from his usual number, and they said the bar in question was usually closed that night of the week. They said Mr K had been grossly negligent in his delay in reporting things to them. They paid Mr K £50 compensation in relation to his calls.

Our investigator looked into things independently and upheld the complaint. They could see how a thief might have watched Mr K entering his phone's passcode, then stolen the phone and accessed his mobile banking using the record of the security details. They said since Mr K's phone was passcode-protected, he didn't quite meet the bar of *gross negligence* in keeping a record of his security details on his phone.

HSBC didn't agree, so the complaint's been passed to me to decide.

I sent Mr K and HSBC a provisional decision on 15 March 2023, to explain why I thought the complaint should be upheld. In that decision, I said:

HSBC argue that this is a police matter. But HSBC are required to refund unauthorised payments, so this is a matter for HSBC as well.

HSBC say the transfer was authenticated using Mr K's phone and online banking security details. But this is not enough, on its own, for HSBC to hold Mr K liable – they also need to be able to evidence that Mr K consented to the transaction, or that he failed to keep his account safe either intentionally or through acting with gross negligence. Otherwise, HSBC have to refund the transaction.

There's a reasonable point of compromise for Mr K's security details. He kept a record of them on his phone, and his phone was stolen. He'd used his phone at the bar, and it was possible for the thief to have watched him enter the passcode. Shoulder surfing is a known technique for fraudsters.

I am reasonably satisfied that Mr K really was pickpocketed, and that his phone was stolen. He has evidenced that he bought a replacement phone later that day, that he also replaced his passport and driver's licence, that he had to reset his Apple ID, and that he reported it as stolen to the police and Action Fraud. I can see that the person using his phone tried to access other accounts, some successfully, and those other businesses have accepted this was fraud. The police have also taken this on as a crime, identified a suspect, and conducted interviews, with a view to pursuing charges. Further, Mr K's testimony has been credible and plausible, and I've found no good reason to doubt him about this.

HSBC argued that the bar was usually closed on that night of the week. But while I see why they thought this, they are mistaken. I can see that bar often changes which nights it's open on. And I can see that on the night in question, Mr K made payments at that bar on his other account, so I'm satisfied he was really there.

HSBC pointed out that there were some hours between when the phone was stolen and the disputed payment. But again, while I understand their point, the fraudster would not have known that Mr K's security details were written in an app. So it's very plausible that they simply didn't find those details at first. Once they found the details, I can see that they drained Mr K's account of the vast majority of funds, sending it to a third party's external account, from which I understand no funds remain, indicating they moved the funds on further. That's consistent with what I'd expect from a fraudster.

HSBC also pointed out that Mr K rang them from his usual number. But I can see from his other account and his store receipt that he replaced his phone before that call. It is normal that his carrier would restore his usual number and disable the old SIM.

Lastly, I've not seen any evidence which makes it seem most likely that Mr K authorised the disputed payment.

So I do not think HSBC can hold Mr K liable on the basis of the payment being authorised.

I've also considered whether Mr K acted with gross negligence, or intentionally failed to keep his account safe. I certainly think Mr K was negligent in keeping a record of his online banking security details – and he should make sure not to do this again in future, now he knows what could happen.

But gross negligence is a much higher standard than normal negligence. It involves a very serious disregard to an obvious risk. Here, Mr K's phone and notes app were protected by a passcode only he knew, and I doubt he'd have expected someone to watch him enter it then pickpocket him. So I can see why he might have thought that the record of his security details was safe enough. And so I don't think Mr K acted in a way reckless enough that it quite meets the bar of gross negligence or an intentional failure to keep his account safe.

I've also considered whether there was an undue delay in Mr K reporting things. But as above, I can see why he might have initially thought his HSBC account was OK. And HSBC haven't been able to show when Mr K first tried to report things – so it's not clear what delay there was, if any. The earliest call recording HSBC could provide was only a few hours after the disputed payment, and during the call it's acknowledged that Mr K had spoken to HSBC about this matter at least once before that. Mr K states he'd spent hours trying to get through to HSBC, and HSBC appear to acknowledge he had issues calling them as they paid him compensation for his calls. I'm not satisfied that there was an undue delay here.

Taking into account everything that's been provided so far, I'm not persuaded that Mr K consented to the disputed transaction, or that he failed to keep his account secure either with intent or gross negligence. So I currently think that HSBC cannot hold him liable for the payment in dispute.

I said I'd consider anything else anyone wanted to give me – so long as I received it before 29 March 2023.

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.

Mr K accepted the provisional decision.

HSBC didn't respond to the provisional decision. They did forward an online banking log we'd previously requested, though this didn't end up showing anything of note – mainly that someone made the disputed payment using Mr K's stolen phone, then some days later Mr K started accessing his online banking using his new phone instead. That all seems consistent with what Mr K said happened.

Neither side sent me any other new evidence or arguments.

So having reconsidered the case, I've come to the same conclusion as before, and for the same reasons as set out in my provisional decision above.

Putting things right

I direct HSBC UK Bank Plc to:

- refund the disputed transaction; and-
- pay simple interest to Mr K on the transaction, at the rate of 8% simple a year, payable from the date it was last debited until the date it's returned[†]. This is to compensate Mr K for the time his money was missing.

[†] HM Revenue & Customs requires HSBC to take off tax from this simple interest. HSBC must give Mr K a certificate showing how much tax they've taken off if he asks for one.

My final decision

I uphold Mr K's complaint, and direct HSBC UK Bank Plc to put things right in the way I set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr K to accept or reject my decision before 27 April 2023.

Adam Charles
Ombudsman