

## The complaint

A company I'll refer to as R complains that Soldo Financial Services Limited (Soldo) declined its claim for a refund of card transactions it says it didn't authorise.

R is represented by one of its directors, Mr M.

## What happened

R has an account with Soldo that lets it assign pre-paid cards to each of its members. Some of its members, including the member in question in this case, are vulnerable and not able to manage their own finances. Soldo's system allows R to set various restrictions on each card, such as an automatic block on the account after a single transaction is made.

Between around 10pm on 22 January 2021 and 1:30am on 23 January 2021, 24 payments of £99.99 (totalling £2,399.76) left R's account. R says it didn't authorise those transactions and that they were made by the member, who had obtained the card details without R's permission. R had recently added spyware to the member's phone, which meant it had added the card details to the phone. And it neglected to remove the card details after it had done so.

When Mr M contacted Soldo to ask for a refund of the payments, Soldo declined the request. So, Mr M brought R's complaint to our service. Our investigator upheld the complaint. She did think R had authorised the payment, but she thought 24 consecutive payments of £99.99 in such a short space of time was unusual on its own and in the context of the historical spending on this account.

She felt Soldo should have noticed something was wrong after the third payment of £99.99 in quick succession and that the remaining payments would have been stopped, had Soldo acted appropriately.

Soldo didn't agree. Among other representations, it said R had negligently left card details on the member's phone, hadn't applied any of the blocking measures available to it and that Soldo had no reason to suspect there was anything wrong with the payments made. It asked for an Ombudsman to review matters afresh.

On 16 August 2022, I issued my provisional findings, which said:

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

*Important to my decision about what is fair and reasonable in the circumstances of this complaint, are the Payment Services Regulations 2017 (the PSR 2017) which apply to transactions like the ones R disputes.*

*Among other things regulation 67 of the PSR 2017 says:*

*67.— (1) A payment transaction is to be regarded as having been authorised by the payer*

for the purposes of this Part only if the payer has given its consent to – (a) the execution of the payment transaction; or

(b) the execution of a series of payment transactions of which that payment transaction forms part.

Whether a payment transaction has been authorised or not is important because account holders will usually be liable for payments they've authorised and, generally speaking, financial institutions will be liable for unauthorised payments.

Mr M has explained that R's employees did not make the transactions and did not know that the transactions were being made. He has explained the member in question isn't capable of managing his own finances and doesn't have control of the funds allocated to him. Instead, R's staff make payments for the member, so he doesn't have direct access to the account funds. That is supported by the account history, which shows previous payments were almost always one-off payments. And far more occasional than the 24 consecutive payments in dispute.

However, that doesn't automatically mean that those transactions are unauthorised and that they should be refunded to R. It's possible for R to give someone else authority to make transactions on its behalf – and it follows that R would then be responsible for them. This is the case even if this person carried out more transactions than R agreed to or expected and is what's known as apparent authority.

If the R has allowed a third party to make use of their payment instrument so that, to Soldo, it looks like the payment transaction has been authorised by R, then the payment can be considered authorised for the purposes of the PSR 2017.

However, apparent authority can't be given negligently. And I'm not persuaded R deliberately gave the member its card details. R had to put its card details onto the member's phone for legitimate purposes, and forgot to remove the details after. I've not seen any evidence to persuade me that R intended to give the member access to its card details, and the payments in question do not fit with the kind of transactions I would expect R to authorise on this account in light of the nature of the purchases, values and frequency/timings of the transactions.

So, it's for the reasons I've set out above that I don't agree with our investigator on the point of authorisation and why I consider R to have authorised the transactions in dispute. Which, on the face of it, means Soldo is liable for those transactions.

However, our service wouldn't tell Soldo to refund authorised transactions if we considered R had failed with intent or gross negligence to keep its security details safe. I've already set out above why I don't think R acted intentionally here and the same rationale applies to failing to keep its security details safe with intent. But gross negligence does warrant further examination.

And Soldo has referred to a number of options R had to protect its account, that it did not use. Of particular relevance to this case, Soldo says that online payments can be turned on or off, that the card can be locked after each transaction, and that daily transaction limits can be set. R says that it regularly used the blocking features available to it, but Soldo has provided a screenshot from its system that says no blocks were applied to the card between 30 September 2020 and the date of the disputed transactions. So, the evidence suggests no blocks were applied.

Further, I accept that it was careless of R's employee to leave card details on the member's

phone. That presented a risk that the card would be used without R's authorisation, which is ultimately what happened.

But mere carelessness isn't enough to meet the standard required for gross negligence in these cases. The Financial Conduct Authority (FCA) has issued the "Payment Services and Electronic Money – Our Approach" to "help businesses to navigate the Payment Services Regulations 2017 (PSRs 2017) and the Electronic Money Regulations 2011 (EMRs) (together with our relevant rules and guidance), and to understand our general approach in this area."

And at paragraph 8.222, the FCA explains "we interpret "gross negligence" to be a higher than the standard negligence under common law. The customer needs to have shown a very significant degree of carelessness." So gross negligence goes far beyond a failure to exercise proper skill and/or care.

And with that being the case, I can't reasonably say R acted with gross negligence. If, as appears to be the case here, R didn't apply the blocks available, that did present a risk to the card. But accidentally leaving card details on a mobile phone was a simple mistake to make, and I can't reasonably say that doing so amounted to a serious disregard of or indifference to an obvious risk.

It follows then that I don't consider R to have authorised the payments it disputes, or to have failed with intent or gross negligence to keep its security details safe. And so, in accordance with the PSR 2017, Soldo is liable to refund R.

Our investigator also found that the payments on the account were unusual, and that Soldo should have acted to stop further payments after the third consecutive transaction of £99.99. While what I've said above means Soldo is liable to refund all of the transactions in dispute, it's worth noting that, even if I didn't consider the transactions to be unauthorised, or if I did find R had failed with intent or gross negligence to keep its security details safe, I agree that Soldo didn't do enough to stop the transactions.

In reaching this conclusion, I've taken into account, the law, regulators rules and guidance, relevant codes of practice and what I consider to have been good industry practice at the time. And I've thought carefully about the payments in dispute here. In doing so I've reviewed the account statements Soldo has provided to see how R operates this particular account.

In the preceding fifteen months, the total expenditure on the account was £1,056.68. £830.72 of that was made in two transactions to a different merchant to the one in question.

There had only ever been two payments on any single day. And indeed, any account activity was sporadic, with no significant bursts of spending on multiple transactions. So, 24 transactions of £99.99 to the same merchant, all in the space of three-and-a-half hours and late at night was not usual account activity. In fact, half of the payments were made over a 38 minute period between 22:01 and 22:39, with the other half being made over a 14 minute period between 01:12 and 01:26.

I recognise Soldo allows customers to apply blocks that would prevent unauthorised use, but in the circumstances of this particular case, I'm not persuaded that that diminished Soldo's need to check transactions. And I don't think Soldo's system applied satisfactory monitoring to look out for unusual transactions or other signs that might indicate that its customers were at risk of fraud (among other things).

Because the payments were to a merchant the account had paid before, I wouldn't expect

*Soldo to have blocked all payments immediately. But after 3 payments of the same amount in the space of a few minutes, I'm satisfied it should have been clear to Soldo that all was not well. And I consider Soldo should have intervened and asked R what was going on. And I'm satisfied that, had it done so, the payments would've stopped.*

*Overall then, I'm persuaded Soldo ought fairly and reasonably to have done more in terms of intervening and questioning R about the nature and purpose of the payments in question.*

*And I'm persuaded that if Soldo had intervened it would have made a difference. Although as I say above, this is a secondary issue because, for the reasons I've set out, I consider Soldo is liable for all of the transactions, because they were unauthorised"*

I invited both parties to make any further submissions or provide any further evidence they wished me to consider. Mr M didn't have anything further to add, but R made a number of representations it wished me to consider.

### **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.

I've considered all of the representations Soldo made in response to my provisional findings. But I'm sorry to say that they don't change my findings. I understand Soldo feels strongly about this complaint, and I want to reassure it that I have made this decision on the balance of probabilities, and on the circumstances of this particular complaint.

I understand the nature of the services Soldo provides and the nature of R's business. And I accept R had various obligations with which it had to comply, and that it had a number of options available to it that could have prevented the transactions from happening. In reaching my decision, I've taken the law and both parties' responsibilities into account, but my overall decision is based on what I consider to be fair and reasonable in the circumstances of this complaint.

And ultimately, I'm not persuaded that R was grossly negligent. I accept there were steps it could have taken by adding restrictions to the card, and that the transactions were made possible by R's error i.e. that it failed to remove the card details from the member's device. However, for the reasons I've set out above, I'm not persuaded that those actions meet the high bar that is required to make a finding of gross negligence.

Soldo did say that their records show the card details were uploaded to the member's device 5 weeks before the disputed transactions started. And that there's no evidence to show they were left in place carelessly. But because of what Mr M has told our service about the member in question being vulnerable and not able to manage their own finances, and because the transactions were reported by R when they were discovered, I accept that the card details were left in place by mistake and not intentionally. So, the timings don't affect my outcome. And again, while I accept that was careless, I don't agree it amounted to gross negligence.

Soldo also argued that the pattern of transactions was not unusual. It said the card in question was active for a little over 3 months and didn't agree there was a fifteen-month history to compare the transactions against. The statement provided by Soldo does indeed show that the first transaction on the account was October 2020, not October 2019.

However, I remain satisfied that the pattern of transactions in dispute was unusual for the reasons I've set out above. There were 24 transactions of the exact same amount (£99.99),

all very close together and all in the final few hours of the day/early hours of the following morning. Which was not in line with usual account activity and I don't find that the lack of a long account history changes matters. Indeed, transactions of this nature on a new account can still be cause for concern such that I would expect a financial business to take action.

Having considered everything both parties have said, my provisional findings haven't changed. So my final decision is that Soldo must reimburse the transactions and pay interest on the balance due to R.

### **My final decision**

Soldo Financial Services Limited must pay R:

1. £2,399.76, being the value of the unauthorised transactions; and
2. Simple interest at the rate of 8% on the above amount, from 22 January 2021 up to the date of settlement.

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

Alex Brooke-Smith  
**Ombudsman**