

The complaint

Miss K has complained that Virgin Media Mobile Finance Limited (VMMF) is holding her liable for a credit agreement she took out to buy a new phone. Miss K says she didn't receive the phone she'd ordered.

What happened

Miss K ordered a new phone using a fixed sum loan agreement from VMMF on 27 November 2022. The phone cost around £400 and the agreement was to be paid back over two years. Miss K says she received a package on 8 December 2022, but the phone that was delivered was a different model to what she ordered, it wasn't new, and it was damaged. Miss K contacted VMMF on the same day to complain.

VMMF asked Miss K to send photos of the phone and the packaging, which she did. It looked into Miss K's complaint. It said the supplier dispatched the correct model, and that it didn't have stock of the phone model Miss K received. It said there was no evidence the packaging had been tampered with. And that the phone model Miss K received came from abroad. So it didn't uphold Miss K's complaint, and she brought it to our service to consider. She says she doesn't want to pay for a phone she didn't receive. She says she's been a VMMF customer for 10 years. This was the third phone she'd ordered.

Our investigator looked into Miss K's complaint. She asked for evidence from VMMF the correct model was dispatched such as proof of the item being scanned, or that a review of CCTV had taken place. She also asked if there'd been any other reports of goods switched in boxes. She asked if the handset had been blacklisted or if it had since been unlisted. And she asked if the phone was usable and whether it could provide details of any usage or sims linked to it. Our investigator also asked Miss K some questions and she said the courier gave her the parcel but didn't ask for a signature. She says she wasn't expecting the phone on the 8 December 2022. And she says the packaging wasn't closed properly.

Our investigator didn't think Miss K had switched the correct model with a damaged one from abroad. She said Miss K had provided clear, consistent answers. And that VMMF hadn't supplied all the evidence she'd asked for. So to resolve the complaint she thought VMMF should end the agreement and refund Miss K what she'd paid towards it, together with interest. She also said she'd expect VMMF to refund any associated tariff charges that hadn't been used.

Miss K accepted the assessment, but VMMF didn't. VMMF said it completed all its checks with the warehouse and that the supplier didn't stock the phone Miss K says she had delivered. It highlighted the outer packaging didn't show signs of being tampered with. It also said the warehouse provided evidence of the phone that was allocated to be dispatched.

The complaint has been passed to me to make a decision.

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.

VMMF is seeking payment under a regulated fixed sum loan agreement, and our service is able to consider complaints relating to these sorts of agreements. VMMF is the creditor and so is also responsible for dealing with claims for breach of contract or misrepresentation made under section 75 of the Consumer Credit Act 1974. The supplier is connected to VMMF which is why VMMF has been able to respond to questions about the delivery of the goods.

There's a lack of evidence here. On the one hand, VMMF has said the supplier doesn't stock the phone that was delivered to Miss K. It says the right phone was sent, and that there's no clear sign of the delivery packaging having been tampered with.

On the other hand, Miss K reported the problems with the delivery the day she received the goods. She says she's bought various phones from the supplier connected with VMMF over the last 10 years and not had an issue. She's been responsive to VMMF's requests, and her testimony has been consistent. There's been nothing in her testimony or actions I've seen that point towards her having misled VMMF.

I'll never know exactly what's happened. And where the evidence is incomplete I have to reach my decision on the balance of probabilities.

There are only a few possibilities. The phone could have been switched by Miss K, by the courier, or by someone at the supplier's warehouse. Our investigator asked for information to help her decide what is the most likely thing to have happened. Having reviewed the pictures of the packaging she didn't think the most likely thing to have happened is that the courier switched the phone. Having looked at photos of the packaging, I agree it looks to be in decent condition. There are no obvious signs of it being tampered with. So I'm not persuaded the most likely thing is that the courier has switched the phone. But I'm not going to rule out that possibility. It looks like VMMF (or the connected supplier) has a process in place for reviewing photos with delivery issues. It's not unheard of for these things to happen.

Moreover, we asked for further evidence from VMMF around what checks the supplier undertook, whether there had been other reports of similar scenarios happening. And details of what happens when the goods are dispatched. We also asked for details of the usage of the phone that was supposed to be delivered. VMMF only responded to say it completed its checks and that the supplier didn't stock the phone Miss K says she was sent. And it said the warehouse provided evidence the phone that was allocated to be dispatched to Miss K, but it didn't supply further supporting information.

Without further explanations or supporting documentation it's hard for me to know whether for example, there's been no reports of phones being switched in the warehouse, or whether there are regular reports. I accept the supplier doesn't supply the phone Miss K received anymore. But that's not what's in dispute. The thing that's in dispute is whether or not at some point in the delivery chain, the phone may have been switched. Given Miss K has been forthcoming with what we've asked, and VMMF hasn't supplied much supporting documentation or responded to all our questions, I'm going to stick with the recommendations our investigator made, because VMMF hasn't done enough to make me decide otherwise.

I've not seen enough to show the correct phone was delivered, or that it wouldn't have been switched at some point. So, on balance, I think this should be treated as a breach of contract VMMF is liable for. And I think the fairest way to put things right now will be to end the agreement and refund Miss K any payments she's made. She'll then be put back in the position she would have been in had she not ordered the phone or taken out the agreement.

Putting things right

Virgin Media Mobile Finance Limited should end the agreement with nothing further to pay. It should refund any payments made under the agreement together with annual interest at 8% simple from the dates the payments were made to the date of settlement. Any adverse data relating to the agreement should also be removed from Miss K's credit file.

If VMMF considers that it's required by HM Revenue & Customs to deduct income tax from that interest, it should tell Miss K how much tax it's taken off. It should also give Miss K a tax deduction certificate if she asks for one, so she can reclaim the tax from HM Revenue & Customs if appropriate.

I'll leave it to VMMF to decide if it wishes to obtain the phone which Miss K received for further investigation. Miss K should make it available if required.

My final decision

My final decision is that I uphold this complaint and direct Virgin Media Mobile Finance Limited to put things right in the way I've set out above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss K to accept or reject my decision before 6 September 2023.

Simon Wingfield
Ombudsman