

## **The complaint**

Mr H complains Santander UK Plc (“Santander”) closed his account and applied a fraud marker against him.

To put things right, Mr H wants Santander to remove the fraud marker it applied against him.

## **What happened**

In October 2010, Santander blocked Mr H’s account after it had received a report that he had received fraudulent funds. Santander attempted to speak to Mr H about his entitlement to these funds.

Later, in November 2020, Santander wrote to Mr H and told him his account would be closed in 30 days’ time. Unhappy with Santander’s actions, Mr H complained. Santander did not uphold his complaint.

Mr H later realised he couldn’t open a bank account elsewhere and pursued his complaint with Santander. Santander had notified CIFAS (Credit Industry Fraud Avoidance System) who applied a category six marker against him.

In summary and in its response, Santander said:

- It had acted properly when restricting Mr H’s account
- As Mr H didn’t provide a reason for why the funds were sent to him and proof of entitlement to them, a decision to close his account in line with the terms and conditions of the account was made
- Santander can not help him with his complaint about the fraud marker

Unhappy with what Santander said in its responses, Mr H referred his complaint to this service. One of our Investigator’s looked into Mr H’s complaint. In summary they found Santander had sufficient grounds to apply the CIFAS marker against him.

Mr H did not agree with our Investigator’s findings. He said he didn’t have anything to do with the crime, and the letter he had sent showed charges were dropped against him by the Police. So as this was the basis of Santander’s application of the marker, it should be removed.

Mr H also accepted that the funds sent to him were fraudulent – but he didn’t know anything about this as he was helping a friend. He also said the funds he’d spent from the fraudulent funds was an innocent mistake, as he believed he was going to receive his salary that day – and was borrowing from his friend’s money as he would pay him back when paid.

Mr H emphasised that if he had anything to do with the crime which led to the fraudulent funds being sent to him, then he would’ve been charged by the Police.

Our Investigator then responded to Mr H’s further arguments. The key points they made

were:

- *"You [Mr H] said that as the charges against you were dropped by the Police, the CIFAS marker registered against your name should be removed. As stated before, Santander are not required to prove beyond reasonable doubt that a consumer is guilty of a fraud of financial crime in order to register the marker. Instead, they must show that there are grounds for more than mere suspicion or concern. So, the fact that the charges against you were dropped, doesn't mean that the CIFAS marker should be removed. I'm satisfied that Santander had sufficient evidence to meet their standard of proof and therefore entitled to escalate their concerns"*
- *"You [Mr H] said you spent some of the funds as you thought you were getting paid on that day (that is on 23 October 2020) and "so I borrowed some of the funds from my friend and would be paying him back". While I acknowledge your comments, I've taken into account that you haven't provided a copy of your payslip for end of October 2020, as confirmation that you were expecting your salary on that day. So, on balance, I still think it's less likely that you could have thought you were using your salary because it wasn't due for another week"*
- *"I've also taken into account your [Mr H's] previous testimony that you were supposed to withdraw the money and give it to your friend once the funds had come in. As stated before, I've looked at the account statements and can't see that any withdrawal for the sum received was made at that time. I note that you logged into your online banking on several occasions on 23 October 2020 and also made a faster payment of £100 during this time.*

*So, I think it's less likely that you were supposed to use this money for the purposes you've explained, which was to receive it for a friend and pass it on to the friend. On balance, I think it's more likely than not that you would have known the funds were going to come in and you had intended to use them as they came in. And in doing so, I think it's more likely than not that you were aware of the true origin of these funds"*

Mr H remained unhappy with what our Investigator said and asked for his complaint to be looked at by a more senior member of this service. It follows this 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 this complaint. I know this will disappoint Mr H, so I'll explain why.

Banks in the UK, like Santander, are strictly regulated and must take certain actions in order to meet their legal and regulatory obligations. They are also required to carry out ongoing monitoring of an existing business relationship. That sometimes means banks need to restrict, or in some cases go as far as closing, customers' accounts.

Having looked at Santander's reasons for restricting Mr H's account, I'm satisfied it hasn't done anything wrong here. I'm also satisfied Santander didn't cause any undue delay in carrying out its review.

Santander is entitled to close an account just as a customer may close an account with it. But before Santander closes an account, it must do so in a way, which complies with the

terms and conditions of the account.

The terms and conditions of the account, which Santander and Mr H had to comply with, say that it could close the account by giving at least two months' notice. And in certain circumstances it can close an account immediately or with less notice.

Having looked at the information given to me by Santander, I'm satisfied it was entitled to close the account in the way that it has done. Mr H may want to know Santander's reasons for restricting and then closing his account. But Santander is under no obligation to do this. I note however it did give Mr H some explanation in its final response.

### *CIFAS marker*

This brings me onto the crux, and overarching point, of Mr H's complaint.

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 is not required to *prove beyond reasonable doubt* that Mr H 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 H's account, whether they are retained or pass through the account. Secondly, Santander will need to have strong evidence to show the consumer was deliberately dishonest in receiving the fraudulent payment 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 misuse of facility with CIFAS.

I've seen a copy of the fraud report Santander was sent by a third-party bank. I also note Mr H accepts he had received fraudulent funds. Because of this, I'm satisfied Santander had reasonable grounds to believe a financial crime had been committed.

Santander would need 'clear, relevant and rigorous' evidence that it could report the potential fraud to the Police. In this case, it quickly became apparent, given the nature of the fraud and how quickly it was reported, that the Police were investigating it. So I'm satisfied that Santander's actions met this test.

But, and as I've said above, Santander will need to have strong evidence to show Mr H was deliberately dishonest in receiving the fraudulent funds – and he knew, or might have known, they were illegitimate. More to the point, I need to weigh up whether I think Mr H was complicit to meet the standard of proof required for such a marker to be applied.

At this point, I must add that where evidence is inconclusive, or incomplete, I am able to reach my findings on the *balance of probabilities*. That is, what I think is most likely to have

happened. This is a different standard to one that criminal courts will apply – normally a defendant in those types of cases needs to be proven guilty *beyond reasonable doubt*.

This is an important distinction given the argument Mr H raises about the Police not charging him. The Police after all deal with investigating criminal matters – and that's not what I'm doing here. I'm deciding whether Santander has acted fairly in applying a CIFAS marker against Mr H in line with the standards I've set out above.

Santander hasn't been able to give me copies of the phone conversations it had with Mr H shortly after the fraud was reported. But it has given me screenshots of its internal systems which show the notes left by its agents when speaking to him. These notes would likely have been left very shortly after any conversation with Mr H. So, in the absence of the calls, I'm satisfied that I can rely on them.

The notes show that when Mr H was asked about the source and his proof of entitlement to the funds on the first call, the call disconnected. There could be a multitude of reasons for this, so I don't think I can draw any inference from this. But a few days later Santander spoke to Mr H again, and when asked again he said he didn't want to say anything about what the transaction was for as he didn't want to incriminate himself as the Police were investigating and he didn't know who was listening to the call.

Mr H later told this service that he had agreed to the transfer of the funds from a friend as they had told him they didn't have access to a bank account. He adds that he doesn't have any records of this as this was all done on an old phone he no longer has. Mr H also says he knew nothing about the source of these funds as he was merely helping out a friend. So he's effectively saying that he wasn't complicit in any fraud.

Given Mr H says he didn't know anything about the funds being fraudulent, I do question strongly why he wasn't more honest with Santander when asked about the funds. To my mind, his conduct with Santander appears to be evasive.

Mr H has also said that he spent some of the fraudulent funds because he believed he was going to be paid the day, or just after the funds came in. He's also said that when he would've been paid his salary, he would've given any funds back to his friend that he'd spent of his. It appears Mr H wasn't going to be paid his salary for at least another week, and I think it's likely he would've known this given how close he was to his overdraft limit suggesting he needed money. Because of this I don't find Mr H's testimony to be plausible or persuasive.

Mr H has said that he had agreed to withdraw the money his friend had sent and give it to him. But for the limited time the account remained unrestricted I haven't seen any evidence that Mr H was looking to withdraw these funds in the way he says he had agreed to.

So taking all of this into account, I'm persuaded on balance that Mr H was most likely complicit and knew that the funds he was receiving were illegitimate. That in turn means he was likely witting and complicit. Because of this I'm satisfied Santander has met the standards of proof it's required to in order to apply the fraud marker it has.

Mr H argues the Police have not charged him for any criminal offence in connection to this despite arresting him and investigating the matter. The letter he has sent from the Police shows that he wasn't charged due to insufficient evidence. That is a different thing to saying he isn't complicit. It's important for Mr H to note here, as I've already explained, that the standards Santander had to meet to apply the marker are different to what the Police were investigating. In this case, I've found that Mr H had received fraudulent funds and it's most likely he knew that they were – in other words he was complicit.

So, in summary, I'm satisfied Santander fairly restricted Mr H's account and closed it in line with its terms and conditions. And that it also fairly applied the CIFAS fraud marker against him. This means I don't think Santander have done anything wrong.

### **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 H to accept or reject my decision before 14 July 2023.

Ketan Nagla

**Ombudsman**