

### **The complaint**

Mr I complains that HSBC UK Bank Plc trading as first direct (“first direct”) failed to refund transactions he didn’t recognise.

### **What happened**

#### *What Mr I says*

Mr I had recently opened an account with first direct and several weeks after receiving his new card, he damaged it. Mr I said he didn’t receive a personal identification number (PIN) with his original card. Mr I then attempted to obtain a new card and PIN using the online chat function and his mobile app.

Both of these items couldn’t be ordered together for security reasons. Mr I eventually spoke with an operator to arrange for his new card and PIN to be sent to him.

Mr I says after four or five days he called the bank because the new card and PIN hadn’t arrived and says he was told to wait for its arrival. A short time later he left the country for about five days. Sometime after returning he attempted to make a large purchase using the Apple pay function on his phone. The payment was declined, and Mr I called first direct to discuss why there was a problem.

It was during this conversation that Mr I was informed he had much less than expected in his account because over the previous three weeks or so, many cash withdrawals had taken place at Automated Teller Machines (ATMs) amounting to about £12,000 in lost funds.

Mr I denied making these transactions and said he’d never received either his new card or PIN from first direct. Arrangements were made to cancel the current card and issue a new card and PIN to Mr I.

After reviewing the situation, first direct declined to refund Mr I the money taken from his account. Mr I was unhappy with their response and made a complaint to first direct about the situation. First direct looked at what had happened but didn’t change their mind about the refund.

Mr I then brought his complaint to the Financial Ombudsman Service for an independent review.

#### *What first direct say*

First direct looked into the situation but didn’t think that Mr I had called them to say he’d yet to receive his new card and PIN. They could find no record of any call and stated that if the card and PIN hadn’t arrived within 4-5 days – they would normally cancel it and reissue the card and PIN.

They didn’t think the delay between ordering the card and notifying them about the problem was reasonable and held him responsible for the losses.

### *The investigation so far*

An investigator was assigned to look into Mr I's complaint and gathered information from both parties. Mr I repeated what had happened and also said he'd had previous problems with his mail some time ago. He also said that first direct had subsequently closed his account down. Mr I said he didn't look at his account unless he was sending money out of it or receiving it, because he knew roughly what was in it.

Mr I said he hadn't reported the issue to the police at the time because he was dealing with first direct. He also said his health conditions were causing him additional stress because of the loss of his funds and how it was being dealt with. He mentioned a recent accident that was causing him difficulty with his back.

First direct provided data about how the transactions were made, showing their use at ATM's, they also sent information about the mobile app use on the account and records of phone calls and searches they'd carried out to check if Mr I had called them shortly after the card was ordered. They couldn't find any record of the call from Mr I to say he hadn't yet had his card.

First direct commented that they noted a change in how the account was operated from when it was opened to when the disputed transactions were made. They said that Mr I regularly logged onto his mobile app when he opened the account, but this stopped shortly before the disputed transactions started happening. Also, there were no initial balance checks made against the card, the pattern of transactions didn't fit any typical fraud scenario and there were no attempts to use the card after Mr I reported it to the bank.

First direct thought it unlikely that the deliveries could have been intercepted as they were posted on different days as a security precaution. The items were sent to Mr I's home address where he lived with one other close family member. They didn't think they should be liable for the losses due to the long delay informing them about the delivery of the card and PIN.

After considering the evidence the investigator didn't uphold Mr I's complaint. In summary he said:

- It was unlikely that someone could intercept these items on two different days.
- It wasn't reasonable to wait for about a month before informing first direct about the account.
- The pattern of transactions didn't follow a typical card theft scenario.
- There was no report to the police at the time.
- He thought it likely that Mr I or someone with his permission used the card to withdraw the money.

Mr I disagreed with the outcome and commented that:

- He did notify first direct that his card and PIN hadn't arrived and would be able to show the call from his phone supplier's evidence.
- He was abroad at the time of some of the disputed transactions and they took place

in an area some way from where he lived.

- He was only aware of the problem when a payment failed due to the available balance. Because he only used Apple pay, he had no reason to suspect there was a problem with his card.
- He believed the outcome was biased.
- He did report it to the police and action fraud and would be able to show this.

As no agreement could be reached, Mr I asked for a further review of his complaint which has now been passed to me for a decision.

I asked if Mr I could supply the evidence he'd referred to, including the issues he referred to with previous mail deliveries. Unfortunately, nothing further has been received, although I understand that Mr I has suffered additional stress as a result of the ongoing complaint.

### **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 was sorry to hear of the difficulties faced by Mr I, including the accident he was involved with and the stress he's experienced.

In complaints such as this one, it's not our role to say exactly what happened, but to decide whether first direct can reasonably hold Mr I liable for these transactions or not. And where there is a dispute about what happened, and the evidence is incomplete or contradictory, as it is here, I must reach my decision on the balance of probabilities – in other words, on what I consider is most likely to have happened in light of the available evidence.

The relevant law surrounding authorisations are the Payment Service Regulations 2017. The basic position is that first direct can hold Mr I liable for the disputed payments if the evidence suggests that it's more likely than not that he made them or authorised them.

First direct can only refuse to refund unauthorised payments if it can prove Mr I authorised the transactions, but first direct cannot say that the use of the card and PIN conclusively proves that the payments were authorised.

Unless first direct can show that consent has been given, it has no authority to make the payment or to debit Mr I's account and any such transaction must be regarded as unauthorised. To start with, I've seen the bank's technical evidence for the disputed transactions. It shows that the transactions were authenticated using the payment tools issued to Mr I. I'll now need to consider the information provided by both parties to determine whether there's sufficient evidence to hold Mr I responsible for the disputed transactions or not.

Put simply, Mr I denies ever receiving a new card and PIN when he told first direct he'd damaged his card at home. Security precautions prevent both card and PIN being sent together. What that means here is for an unknown third party to obtain the card and PIN, they would have to be able to intercept the post on two separate occasions. Mr I said he raised this with the Post Office but never received any response from them. What Mr I is describing is theft from the postal system and I would have thought this type of report would be followed up in some way due to the seriousness of it. Without further evidence of postal problems, it's difficult to understand how both sets of letters from first direct were taken. Mr

I's personal living arrangements mean that no one else in the household could have taken them.

Mr I also said he never received his original PIN, although I haven't seen any evidence that he notified first direct about it (he'd had his original card for some weeks by this point) which I would have thought was essential, especially given that Mr I said he wanted a card to make a deposit into the account at some later point, so would need the PIN as well.

Mr I also stated that he told first direct within 4- 5 days of ordering the new card and PIN that it hadn't yet arrived. First direct have been unable to find any calls about this. They've also said in such a scenario they would usually cancel the card and PIN and re-issue it for security reasons. Mr I said he would supply evidence of the call, but unfortunately he hasn't been able to. So, based on first direct's search of their records, a lack of other activity which could indicate a call to the bank (such as the cancellation of the card) and no evidence from Mr I that he did call the bank, I think on balance, that first direct weren't informed about the problem with the delivery.

I've also thought about the possibility that there was a call that somehow first direct didn't record, but if this was the case and Mr I was aware the card was still missing, I would have thought he'd follow this up at some point with first direct.

I've also considered the way the account was operated up till the point of the request for a new card. It appears that Mr I used his mobile app regularly from when he opened the account until just before the problems started. He then didn't use it until he was notified about the disputed transactions leaving his account. Mr I said he knew roughly what was in it and he mainly used the app when he was sending or receiving funds. He didn't think the lack of use during this period was unusual, but here the change in use of the app that mirrors the disputed transactions shows the account wasn't being monitored during that period.

The card and PIN were used to withdraw cash over several weeks, initially without completing a balance transfer. No other transactions were present such as purchases of expensive easily sellable items which are typically purchased when a criminal has both the card and the PIN. I understand Mr I didn't think this was unusual because of the risk the criminals ran of certain transactions being declined. That may be a risk, but generally if someone steals the card and PIN, they wouldn't know what funds were in the account, they also wouldn't expect it to go unnoticed for very long and would tend to maximise its use until it was blocked, or the funds ran out. That wasn't the case here.

Also, the card wasn't used after it was reported to the bank even though there were funds left in the account. This is often indicative that whoever had the card was aware that it had been blocked. Whilst I wouldn't base a decision solely on how a typical card theft operates, there are several factors here which point towards the card and PIN being used by someone with a lot of knowledge about the account.

I accept that Mr I himself couldn't have made some of the withdrawals because he was abroad, but if his card and PIN were used with his knowledge and permission, he would be held liable for those transactions. There are indications here that the user of the card had knowledge of the account and together with the way the card was used, I think it was more likely than not that Mr I was responsible. Also considering the lack of notice given to first direct about the missing card and PIN, I don't think it would be fair in these specific circumstances to ask first direct to refund the payments taken from the account.

## **My final decision**

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr I to accept or reject my decision before 16 August 2023.

David Perry  
**Ombudsman**