

The complaint

Mr H is unhappy because HSBC UK Bank plc ('First Direct') have declined to refund him in full the £24,500 which he lost as a result of a scam.

What happened

The details of this complaint are well-known to both parties so I will not go into every detail of what happened here. But, in summary, both parties accept that in July 2022 Mr H lost £24,500 as a result of a cryptocurrency investment scam.

The transactions were faster payments, and were as follows:

- 2 July - £500
- 12 July - £2,000
- 19 July - £3,000
- 23 July - £11,000 payment stopped and reversed after First Direct were unable to get through to Mr H.
- 25 July - £3,000
- 25 July - £3,000
- 27 July - £3,000
- 27 July - £2,000
- 28 July - £5,000 – First Direct spoke to Mr H about this payment
- 29 July - £3,000

In May 2022, Mr H received a message that was ostensibly in error from someone I will call Miss L. He sent a joking reply and ended up getting chatting to the sender. They began to speak frequently for over a month and developed a kind of friendship. Mr H confided that he was struggling with insomnia, and Miss L recommended a specialist clinic that was quite expensive. She told him he could fund it if he did some cryptocurrency trading and said she had worked in cryptocurrency before and made a lot of money from it. When Mr H was not interested, Miss L did not push him and continued talking to him as friends. After a few weeks, Mr H changed his mind and decided to give cryptocurrency trading a go.

Miss L told him to download two apps and set up accounts with these two cryptocurrency platforms. She then told him how to move money from his First Direct account to the cryptocurrency account and said she would help him with investing too. He started trading cautiously at first, and Miss L recommended he put more into it. It appeared that his first £500 investment had made notable profit within a matter of days, which he was able to withdraw. Persuaded the investment was legitimate, Mr H continued to invest. Miss L said that she and her team, who she sent him photos of, were specialists and were monitoring the market so they could let him know when it was best to cash in his investment. She sent screenshots that were purporting to show his trades. She even asked him to take out a mortgage to make more money, which he declined to do. He did borrow money from his credit card to finance investments though. Mr H made 9 payments in total over the period of around 27 days. He made one payment attempt for £11,000 which was stopped as First

Direct were not able to get in touch with Mr H. They intervened in one more payment – for £5,000 – and had a discussion with him and put this payment through.

Mr H made the final payment in late July, and decided he wanted to cash in his investment. He told Miss L this, and she informed him that he would need to pay \$13,000 in tax in order to access his funds. She said HMRC would not allow this to come from his alleged \$93,000 profits. It was at this point, Mr H realised he had fallen victim to a scam and in early August he contacted First Direct to notify them of this.

First Direct looked into what had happened and declined to refund Mr H's losses. They said that they were not liable because, in summary, Mr H had not carried out sufficient due diligence to check the authenticity of the scammer, he had ignored their online warning, and that they were not Mr H's point of loss as his funds had gone into his cryptocurrency platform account before being lost.

Unhappy with their response, Mr H complained to our service. One of our investigators looked into what had happened and recommended that Mr H's complaint be upheld in part – refunding 50% of the payments from the fourth onwards. This was because they thought that the payments from this point were unusual and out of character, and First Direct could have prevented the losses if they had intervened after they stopped the £11,000 attempted payment. They thought that Mr H ought to bear some responsibility for the losses too – so recommended that the liability for these payments be shared equally between Mr H and First Direct.

Mr H accepted our investigator's opinion on the matter but First Direct did not. In summary, they said:

- Mr H had not carried out sufficient due diligence and did not meet his expected level of care prior to or during the scam.
- They felt that they had done what they could to try and prevent Mr H falling victim to a scam, including providing an effective warning and speaking to Mr H about some of the transactions.
- Mr H had not been honest with them when they did intervene, and had tried to prevent them from intervening by sending lower value transactions after they stopped and reversed a payment of £11,000. So, they did not feel further intervention would have prevented Mr H's loss – he had clearly wanted to make the payments and did not complete further checks that he was advised to.
- The loss did not take place on Mr H's account, as he did not lose control of his funds until after he sent them on from the cryptocurrency platform account.

As no agreement could be reached, the case was passed to me 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 reached the same conclusion as our investigator and for broadly the same reasons.

I would like to start by saying that I do believe that Mr H was the victim of a cruel and callous scam. I was saddened to hear of what he was been put through. I can tell from the evidence we have that this has had a significant impact on Mr H. So I would like to start by offering my sympathies for what he has been put through in this difficult time.

My role here is to assess First Direct's actions against what they should have done – and having done so, I think it would be fair and reasonable to uphold Mr H's complaint in part.

There is no dispute that the transactions were 'authorised payments', even though Mr H was the victim of a sophisticated scam. Mr H made the payments himself and under the relevant regulations, and the terms and conditions of his account, Mr H is presumed liable for the loss in the first instance.

But I've also 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. In this case, this does not include the Lending Standards Board Contingent Reimbursement Model ('CRM') Code as this code requires the payment to have gone directly to a scammer, and in this case the funds went to an account Mr H set up and had access to in his name with the legitimate cryptocurrency platform. But based on the other relevant rules relating to authorised push payment scams, I think First Direct should fairly and reasonably:

- Have been monitoring accounts and any payments made or received to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams.
- Have had systems in place to look out for unusual and out of character transactions or other signs that might indicate that its customers were at risk of fraud (amongst other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer.
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or made additional checks, before processing a payment, or in some cases declined to make a payment altogether, to help protect customers from the possibility of financial harm from fraud.

So, I consider that as a matter of good practice, First Direct should have been on the lookout for unusual and out of character transactions. In this case it is not in dispute that the attempted £11,000 gave rise to concerns from First Direct that Mr H may be at risk of fraud or financial harm. And I agree that the preceding payments were not so unusual or out of character that they required intervention – they were for relatively low values and they were spread over a number of weeks. But the attempted £11,000 payment represented cause for concern – it followed a pattern not uncommon in scams - there had by this point been multiple, increasing payments to the same account which related to cryptocurrency.

So I think First Direct were correct to intervene with this payment. When they were unable to get through to Mr H, they stopped this payment and reversed it, which I think was the right thing to do as they were unable to establish the legitimacy of the payment. But when Mr M made two payments for £3,000 each just two days later, First Direct did not intervene in any way - and I think they ought to have. I say this because it was clear they had concerns over the £11,000 payment to the same account, and as they never spoke to Mr H there was nothing to alleviate these concerns. I think as a matter of good practice First Direct ought to have spoken to Mr H before putting through any payments to this beneficiary after the failed £11,000 transaction.

But this in and of itself is not enough to say First Direct ought to be liable for any of Mr H's losses. In order to ask them to refund any of Mr H's losses, I need to be satisfied that they could have prevented them. So, I've thought about the sort of things I would have

expected First Direct to have asked and to have said to Mr H. First Direct did end up speaking to him about a £5,000 later, so I have been able to consider this interaction too. First Direct said that this interaction evidences that they could not have prevented Mr H's losses – but I disagree.

In the phone call on 28 July, Mr H was asked whether he understood the previous online warning which he said he did. He was asked if he had sole access to the wallet, if payments were going directly to the company, if he had checked the FCA register and if he had been approached. They asked these questions in relation to the first legitimate crypto app he had signed up for – but he made them aware of the other trading platform and they did not ask the same questions about this one.

But the first cryptocurrency platform was a legitimate one, and I think First Direct as the experts here ought to have asked these kind of questions about the second platform which was not a well known legitimate platform like the first. First Direct ought to have asked questions about whether he was being told what to do with his investment, or told what to say to them. They ought reasonably to have asked about where he found the investment, how he had learned about the platforms and cryptocurrency investments, what sort of returns he was expecting, whether these returns were guaranteed. I think if these questions had been asked, it is more likely than not that the scam would have been identified and the losses prevented. I say this because the scam shared the hallmarks often seen in this type of scam – and had First Direct asked these probing questions it would have brought this to light for them and I think more likely than not for Mr H too. He had not done much research into the second platform – and when he had found some bad reviews Miss L had told him to ignore them. He had not looked them up on the FCA register, or done much by the way of checks, and so I don't think he could have persuaded First Direct that he had done his due diligence. They could have brought to life the risks involved in taking investment advice from someone he had never met or verified. They could have helped him appreciate that the returns were unrealistic – or involved a risk of similar levels of loss.

If this had happened, I think it is likely that Mr H would have done further checks, or even tried to make a further withdrawal which would have exposed the scam. So, I think First Direct have some responsibility for Mr H's losses from the fourth payment which took place on 25th July, after the failed £11,000 payment.

Should Mr H bear some responsibility by way of contributory negligence?

As I have explained, I think on balance that First Direct could have prevented the loss from the fourth payment onwards here. But I also have to consider whether Mr H ought to bear any responsibility for the losses he has incurred too. This is because there is a general principle that consumers must take some responsibility for their decisions. In this instance, I do think that Mr H is partly responsible for his loss – and I think it would be fair and reasonable to make a deduction from the total award because of this.

I say this because I do not think Mr H acted with all due caution here. He met the person over a messaging app. He did not meet them or know them – and whilst I appreciate the scammer put time into building up trust and rapport with Mr H – I think he ought to have done more to verify that the person and the investment opportunity were legitimate here. I appreciate Mr H did not have investment experience in cryptocurrency or otherwise. But I think that he took what he was told on face value, and given the value of the payments he was making this does not seem appropriate here. He even utilised credit in order to fund some of the payments, so it is clear these payments had an impact on his financial situation, yet he did not seek advice or guidance from anyone other than someone he met 'accidentally' on a messaging app. Further to this, Mr H saw negative reviews about the second platform. He said he thought the negative reviews were

probably from legitimate investors who had failed investments – and I understand why he thought this but still think it should have added to his causes for concern. The initial return on his investment was also very high and very quick – which Mr H should have seen as a red flag. He said he did not think it was too good to be true – but he almost doubled his investment within days, which appeared to be done without risk. I think this would have been cause for concern.

So, considering all of this, I think the fair and reasonable outcome here is for Mr H to share liability for his losses with First Direct.

I have also considered First Direct's argument that Mr H's account with them was not the point of loss and so they should not be liable to refund him any of his losses. Whilst I appreciate that the funds went into an account in Mr H's name before going on to the scammer, I still think First Direct missed an opportunity to prevent Mr H's loss here. And I do not think that this was so far removed from the loss occurring that it would be unfair to hold them responsible, in part, here.

Putting things right

Refund 50% of the payments from payment 4 onwards with 8% simple interest from the date of the loss to the date of the payment.

My final decision

I uphold this complaint in part, and ask that HSBC UK Bank Plc provide the partial refund outlined above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 28 April 2024.

Katherine Jones
Ombudsman