

The complaint

Miss A complains that Capital One (Europe) plc (“Capital One”) has not treated her fairly in relation to a purchase she made using her Capital One credit card.

What happened

Miss A went to a photoshoot with a company I will refer to as “S”. Miss A explains she had been contacted by S to see if she was interested in modelling. The first step was to take her photo to see if she had potential hence the photoshoot, which Miss A had to pay £50 up front for. Miss A paid S the £50 by using the services of a third party financial business.

Miss A tells us that after the photoshoot she was told by an employee of S who I will call “Mr C” that she had potential to be a model, but she would need to purchase a portfolio of photographs for £850 if she wanted to progress further.

Moreover, she was also told if she purchased the portfolio she’d be assigned a model manager, her details would be sent to over 120 model agencies who would help her find work. Those modelling agencies would not charge her anything, but they would take a commission from any payment she received from their clients. The commission would be around 10-20% of anything she earned.

Miss A tells us she was reluctant to pay the £850 (or any money), as she’d not been expecting this, and it was a lot of money. However, after thinking it over, Miss A then agreed to go ahead. Therefore, Miss A paid a further £850 (in addition to the £50 she’d paid up front) and she used her credit card with Capital One to pay for £600 of the £850, the remaining £250 Miss A paid using her debit card with a third party bank who I’ll call “B”.

However, Miss A was surprised to find that afterwards she was contacted by modelling agencies who asked for payments to assist her. In particular, she received a call from one agency who I will call “N” who asked for payment, she thought the call had come from Mr C as she recognised his voice. Therefore Miss A began to become suspicious. Miss A’s suspicions were confirmed when N sent her an email and the email address belonged to Mr C.

Miss A demanded her money back from S and got nowhere. Therefore she complained to Capital One and the two other businesses whose services she’d used to pay S. The third party financial business refunded the £50 and B refunded the £250.

In bringing her complaint to Capital One Miss A relies on the rights she believes she has under Section 75 of the Consumer Credit Act 1974 (“Section 75”). The general effect of Section 75 is that if Miss A has a claim for misrepresentation or breach of contract against the supplier (i.e. S) she can also bring a like claim against Capital One provided certain conditions are met.

Capital One took a look at Miss A’s claim against it under Section 75. It concluded that Miss A contracted with S for the creation of a portfolio of photos. S had provided the portfolio therefore there had been no misrepresentation or breach of contract. Therefore Capital One rejected Miss A’s claim.

Dissatisfied with Capital One’s response Miss A complained to our service.

Once Miss A's complaint was with us Miss A sent us a copy of the contract between her and S. The contract talks about how Miss A must send her portfolio to a third party I'll call "O". O will then contact modelling agencies on her behalf. The contract says O will not charge Miss A for these services. But the contract is silent about what the modelling agencies might do.

We sent the contract to Capital One to comment on should it want to do that. Its stance was the agreement changes nothing. The agreement merely states, amongst other things, what O will do, and it did what it was supposed to do. The agreement does not say the modelling agencies will not charge Miss A. Therefore, for this reason too, Capital One told us it rejected Miss A's complaint, as well as for the reasons it had already told us about.

One of our investigators looked at what had happened. Our investigator did not recommend that Miss A's complaint be upheld.

Capital One accepted our investigator's recommendation, Miss A did not. Miss A repeated her earlier stance and asked that an ombudsman review her complaint.

I reviewed Miss A's complaint. As part of my review I considered the available evidence and having done so I said I intended to uphold the complaint. This outcome was different from the outcome our investigator had recommended. Therefore I thought it was fair to let the parties see my provisional findings and make further submissions (if they wanted to) before I made my final decision. Therefore, I issued a provisional decision, I've set out below what I decided provisionally - and why. This forms part of my final decision.

"What I've provisionally 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.

First, I'm very aware that I've summarised this complaint in far less detail than the parties and I've done so using my own words. I'm not going to respond to every single point made by all the parties involved. No discourtesy is intended by this. Instead, I've focussed on what I think are the key issues here.

Our rules allow me to do this. This simply reflects the informal nature of our service as a free alternative to the courts. If there's something I've not mentioned, it isn't because I've ignored it. Rather, I'm satisfied I don't need to comment on every individual argument to be able to reach what I think is the right outcome.

In considering what is fair and reasonable, I need to have regard to the relevant law and regulations, regulator's rules, guidance and standards and codes of practice and (where appropriate) what I consider to have been good industry practice at the time. Miss A seeks to recover the payment she made to a supplier using her credit card. I think Section 75 is relevant law here. I also think a process known as chargeback is relevant. I will look at both issues below.

Miss A complains that she contracted on the basis of a misrepresentation, that is a false statement of fact that she relied on, and which made her contract. She also complains that it was a term of the contract with S that it would assign a modelling agent to her and that it would put her in touch with over 120 modelling agencies and that they'd not charge her directly for their work. Rather they'd take a commission of between 10-20% from any fees paid to her by their clients.

Miss A and Capital One disagree about what representations were made prior to the contract and whether any such verbal representations ultimately formed part of the contract. Where the evidence is incomplete, inconclusive, or contradictory (as some of it is here), I reach my decision on the balance of probabilities – in other words, what I consider is most likely to have happened in the light of the available evidence and the wider circumstances.

Capital One points to the contract between Miss A and S, it tells us the contract does not mention anything about the specific representations that Miss A says were made prior to the contract. That is correct. But then again that is not all that surprising as Miss A tells us the representations were made verbally, before the contract was made.

By their very nature such alleged verbal representations are hard to substantiate, and I therefore have to assess this aspect on the basis of the balance of probabilities and to do that I need to look at the wider circumstances.

When I look at the wider circumstances, I think it is significant that Miss A went to S's studio in the first place as she was interested in a modelling career. She did not want a portfolio of photos for her own use, neither does it seem as if she had any contacts in the modelling world. Rather she was there following an approach from S in which it told her first it had to assess her modelling potential via a photoshoot. In this context I find it likely that, amongst other things, S and Miss A would have talked about modelling agencies. Moreover, I find it unlikely that if S had said O will not charge you, but the modelling agencies will or may Miss A would still have proceeded. I am persuaded that Miss A was already fed up at this point with having to pay for the portfolio, she did not want to dip her hand in her pocket further. In other words, I think Miss A only went ahead because she was told the modelling agencies would not charge her.

Further, Miss A has given us a consistent, detailed and credible account of what she was told. Whereas Capital One has not told us S's side of the story beyond pointing to the contract, although I think it has had a fair chance to ask S about its stance.

Further, I think the seeming double role of Mr C who appeared to be involved with both S and at least one of the modelling agencies (i.e. N) suggests to me that there was some overarching arrangement here between the notionally separate entities of S and N. I don't think that overarching arrangement was disclosed to Miss A. This lack of transparency leads me to think that on balance, all was not as it would seem with S. I have no reason to doubt Mr Cs involvement was as Miss A says, Capital One has provided no evidence to rebut what she says.

For all of these reasons I find it more likely than not that S did make the verbal representations that Miss A says it made. Moreover, I am satisfied those representations were false and that Miss A relied on them and that is why she contracted.

I have found on balance that the contract that Miss A made with S and paid for in part using her credit card was misrepresented to Miss A. Therefore I don't need to look any further at the breach of contract aspect of this complaint. This is because Miss A will be getting a full remedy for misrepresentation and there would be no further remedy that I could fairly and reasonably give Miss A on top of this, even if I found that there was a breach of contract.

I've also thought about chargeback here. This is because Miss A paid for the goods and services using her credit card and wanted a refund. I've thought about whether Capital One dealt with Miss A fairly in relation to this possible route for obtaining a refund for her. The chargeback process is relevant in this case even though it does not appear Capital One attempted a chargeback. I say this because, this is a way in which payment settlement disputes are resolved between card issuers and merchants. They are dealt with under the relevant card scheme rules. In certain circumstances the process provides a way for Capital One to ask for a payment Miss A made to be refunded. Those circumstances include where goods or services aren't as described or misrepresented by the company Miss A paid. A chargeback doesn't guarantee a refund.

However, importantly, chargeback is not a forum for determining the underlying legal rights of the parties to the contract of sale and the evidence that the rules require is very

prescriptive. And when I look at the relevant chargeback rules and the information I have about this complaint, I don't think any chargeback attempt would have been successful.

In any event this is a moot point, I mention it for completeness only. On balance, I've found the contract was misrepresented, and I am awarding a remedy for this. Any remedy Miss A might have been entitled to under the chargeback rules would not have been more than the remedy she is going to receive anyway.

My provisional decision

My provisional decision is that Capital One (Europe) plc must refund Miss A's £600 if Miss A has not paid off this £600 Capital One must rework her credit card account as if this payment was never made. If Miss A has paid off this £600 then it must send her £600 directly.

If Capital One has to pay Miss A £600 directly then it must pay the £600 within 28 days of the date on which Miss A accepts my final decision. If it pays later than this it must also pay interest on the compensation from the date of the final decision until the date of payment at the rate of 8% simple per year."

Both Miss A and Capital One responded to my provisional decision. Miss A accepted it, and she also told us she'd closed her account with Capital One. Capital One accepted my provisional decision too.

Further, Capital One offered to pay the £250 that Miss A had previously told us had been permanently refunded by B. As far as we were aware this situation had not changed. However, we double-checked with Miss A to reconfirm what had happened to the £250. At this point Miss A told us that the £250 had been refunded to her on an interim basis only. And in fact B had since debited the £250 again from her account. Miss A showed us statements from B to back up what she said. We sent these statements to Capital One so it could comment further should it want to do that. Capital One reconfirmed that it would pay Miss A the £250 as well as the £600.

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 thank both Miss A and Capital One for their responses to my provisional decision.

Section 75 allows Miss A to recover the total sum she paid to S as a result of its misrepresentation (that is £850). Therefore, if I had been aware before I issued my provisional decision that the refund of the £250 was given to Miss A by B on an interim basis only and had since been reversed, my redress would have been slightly different. Specifically, I would have ordered Capital One to pay the £250 too, as part of that decision. However, as I set out above, Capital One acting independently, commendably, offered to pay the £250 as well as the £600 when it accepted my provisional decision. It follows that I endorse Capital One's offer.

On reflection, I also find that in the circumstances it would be appropriate for Capital One to pay interest on the entire award.

My final decision

My final decision is that Capital One (Europe) plc must refund the £600 Miss A spent on its credit card and the £250 she spent using her debit card with B. Plus it must pay interest on both the £600 and £250. For the £600 the interest should run from the date of payment until the date of settlement. For the £250 the interest should run from the date the £250 was

redebited, which from the information I have was 24 October 2022 until the date of settlement. For both sums the interest should be applied at the rate of 8% per year simple.

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

Miss A should refer back to Capital One (Europe) plc, if she is unsure of the approach it has taken and both parties should contact HM Revenue & Customs if they want to know more about the tax treatment of this portion of the compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss A to accept or reject my decision before 7 September 2023.

Joyce Gordon
Ombudsman