DRN-4300094

The complaint

Mr H complains that Nationwide didn't do enough to protect him from the financial harm caused by an investment scam company, or to help him recover the money once he'd reported the scam to it.

What happened

Mr H saw an advert on social media for an opportunity to invest in cryptocurrency with a company I'll refer to as "F". He responded to the advert and was contacted by someone claiming to be a broker working for F, who instructed him to open an account on its trading platform.

Before going ahead with the investment, Mr H noted the website was professional and that the broker provided live Q&A sessions and weekly updates. The broker also encouraged him to speak to other investors via a telegram group who claimed to be ex-employees at reputable companies.

Mr H understood that he was using cryptocurrency exchanges to transfer his money into USD with a view to protecting himself from the falling value of the pound, and this was the lowest cost way to do the transfers. The broker told him to first purchase the currency through a cryptocurrency exchange company and then load it onto an online wallet.

Between 5 January 2022 and 9 September 2022, he made 93 payments to two cryptocurrency exchange companies and a payment platform totalling £200,573.72. During the scam period, he received credits worth £21,116.02, so his total loss was £179,457.70. He realised he'd been the victim of a scam in October 2022 when F issued a statement that it had to suspend withdrawals due to an external event which had caused significant losses.

Mr H complained to this service arguing Nationwide could have done more to alert him about the use of cryptocurrency exchange companies by scammers as he had no idea that sophisticated frauds like this were operating. He said he'd been working towards investing for his retirement and warnings and consultation from Nationwide could have prevented much of his loss.

Mr H explained the investment was endorsed by people he thought were reputable in the industry and the apparent involvement of these people made it difficult for him to identify the investment as a scam. He argued Nationwide had experience in dealing with scams and could have warned him about the risk. And that if Nationwide had intervened and told how to check the investment was genuine, he wouldn't have made the payments.

Nationwide agreed to refund 50% of the money Mr H had lost from 9 February 2022 onwards, which was £86,810.01. But Mr H felt the 50% reduction was unfair as he didn't think he could have done more to identify the investment was a scam. He explained that he did substantial research and relied on documents and video statements, which led him to believe the investment was genuine.

My provisional findings

The CRM Code requires firms to reimburse customers who have been the victims of Authorised Push Payment ('APP') scams, like the one Mr H says he's fallen victim to, in all but a limited number of circumstances. But the CRM code didn't apply in this case because the disputed payments were to an account in Mr H's own name.

I thought about whether Nationwide could've done more to recover Mr H's payments when he reported the scam to it. Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa's arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. Nationwide) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder (Mr H).

Mr H's own testimony supports that he used cryptocurrency exchanges to facilitate the transfers. Its only possible to make a chargeback claim to the merchant that received the disputed payments. It's most likely that the cryptocurrency exchanges would have been able to evidence they'd done what was asked of them. That is, in exchange for Mr H's payments, they converted and sent an amount of cryptocurrency to the wallet address provided. So, any chargeback was destined fail, therefore I was satisfied that Nationwide's decision not to raise a chargeback request against either of the cryptocurrency exchange companies was fair.

I was also satisfied Mr H 'authorised' the payments for the purposes of the of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. So, although he didn't intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, he is presumed liable for the loss in the first instance.

There was no dispute that this was a scam, but although Mr H didn't intend his money to go to scammers, he did authorise the disputed payments. Nationwide is expected to process payments and withdrawals that a customer authorises it to make, but where the customer has been the victim of a scam, it may sometimes be fair and reasonable for the bank to reimburse them even though they authorised the payment.

Prevention

Nationwide had reimbursed 50% of the money Mr H lost from 7 January 2023 onwards. But as he complained that the settlement shouldn't have been reduced for contributory negligence, I needed to consider what I thought should have happened to decide whether he is entitled to anything else.

Buying cryptocurrency is a legitimate activity and from the evidence I'd seen, the payments were to a genuine cryptocurrency exchange company. However, Nationwide had an obligation to be alert to fraud and scams and these payments were part of a wider scam, so I needed to consider whether it ought to have intervened to warn Mr H when he tried to make the payments. If there are unusual or suspicious payments on an account, I'd expect Nationwide to intervene with a view to protecting Mr H from financial harm due to fraud.

The payments didn't flag as suspicious on Nationwide's systems. I considered the nature of the payments in the context of whether they were unusual or uncharacteristic of how Mr H normally ran his account and I thought they were. The first five payments were low value and, even though they were to a cryptocurrency exchange company, they weren't unusual or suspicious and so I didn't think Nationwide missed an opportunity to intervene. However, on 7 January 2022, Mr H made a payment of £250, which was the fourth payment he'd made that day to the same cryptocurrency exchange. The cumulative total was only £682.62, so the amount wasn't concerning. But to make four payments in succession to the same cryptocurrency merchant represents a pattern of spending which ought to have raised concerns, so I agreed that Nationwide ought to have intervened at that point.

I explained that I would expect Nationwide to have contacted Mr H and asked him some probing questions around the purpose of the payment. This would include questions around how he'd learned about the investment opportunity, whether he was being advised by a third party or broker and, if so, how he met the third party or broker. I would also expect it to ask him about the returns he expected, whether he'd been asked to download remote access software, whether he'd made any withdrawals and whether he'd been told to make an onward payment from the cryptocurrency exchange.

If Mr H was asked these questions, I was satisfied he'd have answered truthfully and that he'd have provided as much information about the investment as he reasonably could. This is because there's no evidence he'd been coached to lie to Nationwide, and he really believed the investment was genuine, so I there's no reason he wouldn't have been open in his responses to the call handler.

With this information, I would expect Nationwide to have drawn Mr H's attention to the fact there were red flags present, including the fact he'd seen F advertised online and that he'd been advised to make onward payments to a wallet address provided to him by the broker. I would also expect it to have provided a tailored scam warning describing how cryptocurrency scams work and to advise him that it would be unusual to invest in something he'd seen social media and that scammers often instruct people to move cryptocurrency to a wallet in their control.

I would also expect it to provide advice on additional due diligence, including checking the FCA website himself. This should include a warning about the importance of checking the details of all beneficiaries, and advice that he should contact the details of the company registered on the FCA website to check what he'd been told about F's affiliation with that company.

Mr H had said he was happy with the checks he'd done and that he believed F was affiliated with a brokerage that was regulated by the FCA. There were no warnings about F on either the Financial Conduct Authority ("FCA") or International Organisation of Securities Commissions ("IOCSO") websites which would have alerted him to the fact there was a scam. But if he'd contacted the company using the contact details on the FCA website to check the information he'd been given, he'd have realised F wasn't associated with the brokerage, and he'd have realised there was a problem.

Mr H was using money from his pension and savings, and I hadn't seen any evidence that he was keen to take risks. So, I thought he'd have followed any advice from Nationwide regarding additional due diligence and decided not to go ahead with the investment once he learned about the red flags and realised it wasn't registered with the FCA. Because of this, I was satisfied that Nationwide failed to intervene on 7 January 2023 in circumstances which would have prevented his loss and I was minded direct it to refund the money he lost from that point onwards.

Contributory negligence

I considered whether the settlement should be reduced for contributory negligence, but I didn't think it should. Mr H had explained that he believed what he was told by the broker and those he thought were genuine investors on the telegram group he was part of. He was also impressed by those he thought were running the investment and the professional-looking material he was sent about the investment.

He did some basic research and was satisfied the returns were plausible and that they could be achieved by the experts he trusted were running the investment. He also explained why he believed F was authorised to carry out financial services in the UK and I was satisfied his explanation was reasonable, and I wouldn't expect him to have anticipated that the information he was given about F's affiliation with another entity was false. I also thought the explanation that he thought F had offices in the Seychelles for tax purposes was reasonable.

I noted Mr H had invested before and so we'd expect him to have some existing knowledge regarding the risk of fraud, but this was a sophisticated scam, and he'd taken what he thought were reasonable steps to check the investment was genuine. So, I didn't think he contributed to his own loss in failing identify that F was a scam. Consequently, whilst there may be cases where a reduction for contributory negligence is appropriate, I didn't think this was one of them.

Developments

Nationwide maintains the settlement should be reduced for contributory negligence, arguing Mr H could have done more to protect himself prior to becoming involved with F. It has offered to pay the settlement with a reduction of 20% plus 8% interest, less any credits received.

It has argued that Mr H was expecting something 'too good to be true' given the returns were between 20-43% with no risk to the capital and he had invested before so he should have realised the returns were unrealistic.

It has also said that despite having said he wouldn't have invested if he didn't think he'd done his research, Mr H opted for a company which had no proven or credible history, and he had relied on information provided by F. Further, he was satisfied F operated in the UK under an FCA registration number that it shared with its EU owned brokerage, but he didn't do anything to check this.

Finally, it has noted that Mr H was convinced the risks were minimal due to the reputation of the people he thought were running the investment, but there was no independent third party reassurance. And he invested in a company whose offices were abroad, in a high risk country.

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 considered Nationwide's additional comments, the findings in my final decision will be the same as the findings in my provisional decision.

Nationwide has suggested that Mr H should have been concerned by the fact he was promised unrealistic returns and the fact he had invested before means he should have been more knowledgeable than someone with no investment experience. I'm satisfied with Mr H's explanation that he was satisfied the returns were plausible and that they could be achieved by the experts he trusted were running the investment. In recent years instances of individuals making large amounts of money by trading in cryptocurrency have been highly publicised to the extent that I don't think it was unreasonable for him to have believed what he was told in terms of the returns he was told were possible.

Nationwide has also said that Mr H relied on information provided to him by F, despite having said he wouldn't have invested if he didn't think he'd done his research. It has also noted he didn't check what he was told about F sharing an FCA registration number with its EU owned brokerage. I accept that with more careful checking Mr H might have been able to work out that the claim that F was registered with the FCA was false by contacting the details of the company registered on the FCA website. But this was a sophisticated scam, and I don't think it was unreasonable that he didn't know how to check the information he was given or to have taken at face value what he was told by those he trusted to be running the investment.

I also accept that he went ahead with the investment without having taken any third-party advice. But this was a sophisticated scam and the involvement of a broker and those he perceived to be reputable in the industry, coupled with the endorsement of other investors was enough to satisfy him that this was a sound investment. Mr H's loss might have been prevented if he had sought independent financial advice, but I don't think it was unreasonable that he chose to go ahead without doing this, or that his failure to do so means he should share responsibility for his own loss.

Finally, as I noted in my provisional decision, I'm satisfied that Mr H's explanation that he thought F had offices in the Seychelles for tax purposes was reasonable.

Overall, I remain satisfied that Nationwide should refund the money Mr H lost from 7 January 2023 onwards and while there may be cases where a reduction for contributory negligence is appropriate, I don't think this is one of them.

My final decision

My final decision is that Nationwide Building Society should:

- Refund a total of £178,480, less the money it has already refunded.
- pay 8% simple interest*, per year, from the respective dates of loss to the date of settlement.

*If Nationwide Building Society deducts tax in relation to the interest element of this award it should provide Mr H with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 2 January 2024.

Carolyn Bonnell
Ombudsman