

The complaint

Miss F complains Nationwide Building Society unfairly refused to refund her unauthorised transactions on her account.

What happened

In early February 2023 Miss F informed Nationwide there were multiple transactions on her account which she didn't recognise or authorise. These consisted of mobile banking transfers to two new payees, a transfer to an existing payee and contactless payments. The transactions totalled just over £2,000. During the same period an overdraft was applied for on Miss F's account and approved. The transactions carried out took Miss F's account into her overdraft.

Nationwide reviewed Miss F's fraud claim and the account activity. Nationwide declined the claim overall, explaining the evidence suggested Miss F had authorised the transactions. It also explained the overdraft was applied for through Miss F's account and as it couldn't see how the account had been compromised Miss F will remain liable for the overdraft spending. An Investigator reviewed Miss F's complaint and partially upheld the complaint. Based on the available evidence they found that Nationwide had acted fairly in deciding not to refund the disputed transactions. However, they recommended Nationwide clear the overdraft that was added to the account as it wasn't applied for by Miss F.

Miss F disagreed with the findings and maintained she had no involvement with the transactions. Nationwide also disagreed with the recommendations, explaining Miss F should be held liable for the overdraft on the account as she has either applied for it herself or she has given a third party assumed authority of her account.

As neither party agreed with the recommendations made, the complaint has been referred to an ombudsman for a final decision.

I issued my provisional decision on 9 May 2024. The deadline has now passed so I will issue my final decision.

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've included my provisional decision below.

Provisional decision

I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

When considering what is fair and reasonable, I'm required to take into account: relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and, where

appropriate, what I consider good industry practice at the relevant time.

Miss F is represented in this complaint, and I can see detailed submissions have been provided about Miss F's complaint and a connected complaint. In this decision I will be focusing on the activity on Miss F's account alone. I'm also aware that I've summarised this complaint briefly. No discourtesy is intended by this. Instead, I've focussed on what I think is the heart of the matter here. If there's something I've not mentioned, it isn't because I've ignored it. This simply reflects the informal nature of our service.

Firstly, I am sorry to see Miss F has had cause for complaint. I don't underestimate the worry and anguish this situation has caused, and also the stress of dealing with the complaint about it. Having looked at the complaint fully, my review of the evidence has led me to the same overall conclusions as the Investigator previously set out and for much the same reasons. I will explain why.

Under the relevant regulations – the Payment Services Regulations 2017, Miss F is liable for transactions she has authorised – either by carrying them out himself or giving permission for another party to carry them out on her behalf. The PSRs 2017 also set out that where a payment isn't authorised by the account holder, they may still be liable for it if they've failed with intent or gross negligence to adhere to the terms of their account or keep their personalised security credentials safe.

There are occasions when people can be persuaded to make a payment or share their banking details, not realising that it's part of a scam or that this third party will utilise their details to make transactions they don't consent to. Or an individual can be pressured to provide access to their account. Both Nationwide and our Investigator have provided Miss F and her representative the opportunity to provide details about the account activity and her circumstances at the time. I can see throughout Miss F's complaint she has maintained that she was in possession of her phone and card and hadn't disclosed her banking credentials to a third party. Miss F also maintains the payments were made without her knowledge and authorisation. I must therefore consider her complaint on this basis.

Nationwide has considered Miss F's testimony alongside the technical information it holds about Miss F's account and the transactions to reach the view that Miss F has authorised the transactions. I can't say with complete certainty how the transactions took place, but I must decide whether Nationwide concluding that Miss F most likely authorised the payments she is disputing, based on the information available to them, is fair.

Nationwide has provided the technical evidence it had relied on to decline Miss F's claim. This includes her online banking log in activity. Miss F says she lost access to her account on 10 January 2023. Miss F explains she contacted Nationwide about this, but it says it has no record of Miss F contacting it about account access issues. The technical evidence shows that Miss F was accessing her online banking during January and had repeatedly logged in to her account. This activity all happened before and after the alleged fraudulent transactions. This evidence suggests that Miss F was able to view the transactions that occurred, and she was aware of the spending on her account.

Two new payees were set up on Miss F's account and transfers made to them. In order to set up a new payee access to Miss F's PIN, card and a generated code that would be sent to her device would be required. This means that a third party would've had to access a number of details, along with Miss F's phone and card to set up the payees. Miss F has maintained throughout her complaint that she hadn't disclosed her credentials to a third party and no one else had access to her card or phone. Based on Miss F's comments it's difficult to establish how all these details could've been accessed by an unknown third party without her knowledge.

Nationwide has also confirmed that a new device was registered to Miss F's account. Miss F says she has no knowledge of this, but the new device could only be registered with access to Miss F's banking credentials and her card. The activity Miss F disputes also occurred over two cards and considering this alongside the registration of a new device it's clear the activity on Miss F's account has changed. However, based on Miss F's comments it's not been possible to establish a clear point of compromise of Miss F's phone, account details and card. In order for a third party to access all these details, I think it's most likely Miss F would've had to provide some form of access.

I must also highlight that the disputed transactions in themselves are unusual. Transfers appear to be made to individuals, and a transfer also occurred to an existing payee who is a family member. The activity is spread over a period of roughly one month and some of the payments are for what you would consider general everyday spending. Usually if a third party somehow obtains access to an account, they spend the available amount quickly to maximise their gain before the activity is identified by the account holder. The transactions in Miss F's case vary in value and appear to take place at very different times of day and involve transfers to individuals. This poses a greater risk to those carrying out the transactions and it seems implausible that an unknown third party would've taken these risks to carry out the transactions in this manner.

Overall, having considered everything, all of the available evidence points to it being more likely than not that Miss F provided authority for the transactions and enabled her account to be accessed. I realise that this is not the outcome Miss F was hoping for, and she will be disappointed by the provisional decision I've reached. As such, I cannot fairly and reasonably require Nationwide take any further action in relation to this aspect of her complaint.

Overdraft

During the period of transactions Miss F says she didn't make an overdraft was applied for on 12 January 2023. Nationwide has provided details which confirm this was applied for online and a £1,000 overdraft was granted. The Investigator recommended Nationwide clear the overdraft amount as the evidence suggested Miss F didn't consent to the overdraft application and the transfers made using it.

As mentioned above the relevant regulations for me to consider are the Payment Services Regulations 2017. However, the PSR's only apply when there is a credit balance in the account. Nationwide's records indicate that of the disputed amount, a proportion was credit, in the form of this overdraft. Where unauthorised transactions occur using a credit facility then the Consumer Credit Act 1974 (CCA) will apply in place of part of the PSRs.

In a broad summary this means that a consumer isn't liable for the use of the credit facility unless they or someone acting as their agent used the facility. Gross negligence or otherwise, isn't a consideration. In Miss F's case there's sufficient evidence to suggest third party involvement. However, as gross negligence isn't a consideration Miss F's liability for the overdraft differs to that of her own account balance. Essentially, although there are gross negligence failings on Miss F's part, she isn't wholly liable for the borrowing.

Responses to the provisional decision

Nationwide responded to the provisional decision stating Miss F had let a third party use her account and this is a breach of the account terms. It also explained that as Miss F couldn't provide a plausible explanation as to how someone accessed her phone, card and PIN, and this means Miss F benefitted from the funds in the account.

As noted in the provisional decision, I agree that it's more likely than not that Miss F provided authority for the transactions and enabled her account to be accessed. However, as the PSR's don't apply to credit, I have considered the overdraft in light of the Consumer Credit Act 1974 (CCA). I am satisfied, based on the available evidence, that there was third party involvement with the application and use of the overdraft. So, although there are gross negligence failings on Miss F's part, she is not liable for the borrowing.

Miss F replied and disagreed with the provisional decision. Miss F says the comments about the spending on the account are unreasonable, and Nationwide has treated her poorly. I understand the strength of Miss F's feelings, but account activity is one of many factors we must consider when reviewing fraudulent claims as any changes or trends can help us gain a clear understanding of the overall circumstances.

I can also see Miss F has asked for third party bank details. Unfortunately, I am unable to provide this information. This information may already be within statements Miss F has or Nationwide may be able to provide further information.

I realise that this is not the outcome Miss F was hoping for, and she will be disappointed by the decision I've reached. But I hope my decision provides some clarity around why I won't be asking Nationwide to refund the full amount Miss F has claimed.

Putting things right

For the reasons outlined above my decision is that I uphold this complaint in part. I direct Nationwide Building Society to do the following:

- Remove the debt owed by Miss F for the overdraft and any associated interest.
- Clear negative recordings made with credit reference agencies in relation to the overdraft.

My final decision

I uphold this complaint in part.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss F to accept or reject my decision before 3 July 2024.

Chandni Green
Ombudsman