

The complaint

Miss L complains that NewDay Ltd, trading as Aqua, won't refund her for a package holiday.

What happened

In May 2023 Miss L used her NewDay Ltd, trading as Aqua, ('Aqua' for short) credit card to pay for a package holiday for her and another to depart later in May 2023. On the day of departure Miss L discovered she had Pneumonia and Covid. So she contacted Aqua and was told she'd have to cancel or lose the holiday. The Supplier of the holiday wouldn't refund her. So she complained to Aqua.

Aqua considered her dispute with the holiday supplier under both the chargeback process and under a claim under section 75 of the Consumer Credit Act 1974 ("S75" and "CCA" respectively). It concluded that it didn't have to do anything further for Miss L. Feeling that Aqua's position to be unfair, Miss L brought her complaint to this service.

Our investigator looked into the matter. Overall, she felt that Aqua had fairly treated Miss L. However Miss L didn't agree. So the complaint has been 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.

I should make very clear that this decision is not about the supplier which isn't a financial services provider and doesn't fall within my remit regarding either chargeback or Section 75. Whatever the issues there maybe with the package supplier here, and just because Miss L has lost out, it doesn't necessarily follow that Aqua has treated Miss L unfairly or that it should refund her. And this decision is solely about how Aqua treated Miss L. I hope this point is clear.

chargeback

There's no dispute that Miss L's Aqua card was used here in this transaction. So I don't think Aqua did anything wrong by charging this transaction to her account when it did. In certain circumstances, when a cardholder has a dispute regarding a transaction, as Miss L does here, Aqua (as the card issuer) can attempt to go through a chargeback process. Chargeback is a voluntary process which is decided simply on the facts of the dispute within the rules of the card scheme (not managed by Aqua). I don't think Aqua could've challenged the payment on the basis Miss L didn't properly authorise the transaction, given the conclusion on this issue that I've already set out.

This service considers it good practice to raise chargebacks where firms feel that the chargeback has a reasonable prospect of success. Here, however Aqua didn't pursue a chargeback to the end of the process because it didn't feel Miss L's dispute had a reasonable prospect of success. And I agree.

I've looked at the supplier's terms. It says if you're sick with Covid you won't be allowed to travel by the airlines. It says if you contact the supplier within five days of travel and tell them you've got Covid your holiday will be treated as cancelled by the person who has Covid. The terms also say you cannot change or transfer your holiday within five days of travelling. The terms also explain that if cancelling within five days there is no refund. The terms also explain if you don't attend the flights you'll be treated as a no-show and your holiday will be non-refundable.

In short it's clear to me that in the circumstances Miss L found herself in on the day of travel she couldn't get a refund whatever course of action she took. She'd either be treated as cancelling her holiday by telling the supplier she was ill or if she attended the airport she'd be denied boarding due to being sick and she'd get no refund.

Accordingly I'm not persuaded that Miss L has been treated unfairly by Aqua not taking her chargeback further as I don't think any such chargeback under any available reason code would have been successful. So she hasn't lost out due to Aqua's stance on chargeback.

The CCA

The CCA introduced a regime of connected lender liability under S75 that afforded consumers ("debtors") a right of recourse against lenders ("creditors") that provide the finance for the acquisition of goods or services from a third-party merchant (the "supplier"). S75 says:

"If the debtor under a debtor-creditor-supplier agreement falling within section 12(b) or (c) has, in relation to a transaction financed by the agreement, any claim against the supplier in respect of a misrepresentation or breach of contract, she shall have a like claim against the creditor, who, with the supplier, shall accordingly be jointly and severally liable to the debtor."

I'm satisfied the CCA pre-requisites of financial limits and the Debtor Creditor Supplier arrangement are met. So the test is here, did Aqua consider Miss L's S75 claim to it fairly, or in other words is there a breach of contract or material misrepresentation made out here against the holiday company that Aqua should fairly be held responsible for.

I've considered the terms of the supplier here as I've already explained. The supplier and indeed airlines and hotel providers are entitled to try to protect their customers from people contagious or sick and to have such terms to that end. I feel very sorry for Miss L that she found herself in this position. However it wasn't either the supplier or Aqua that caused these illnesses that Miss L had. And as this is the case and as the supplier is entitled to have such terms in its agreements, I see no persuasive reason for Miss L's complaint to be upheld.

The contract here has operated as it was agreed at the outset. No refund would be payable in the event of Miss L being sick on the day of travel. The contract sets out it cannot be changed within five days of travel and I've seen no persuasive evidence of Miss L trying to change it before that five day point happened before her flights.

So, sadly, come the day of travel Miss L couldn't get any refund however she approached the matter. So when Miss L contacted the supplier and as she describes it was told the

holiday would be cancelled or she'd lose the holiday in any event, this was a fair reflection of the agreement made.

Miss L points to the unfair contract terms rules and other legislation and regulation in this area. I'm not persuaded by Miss L's arguments here. Just because she's lost out doesn't mean these terms were unfair. I well understand Miss L's feeling of being treated unfairly but this is not by Aqua. It has applied these terms fairly. Miss L has not lost out due to Aqua. She's lost out due to contracting these diseases at a particularly unfortunate time which meant she couldn't travel.

Miss L says she never cancelled the holiday, she was denied boarding. This doesn't make any difference here. In any event she wasn't due any refund whether she actually cancelled, was treated as cancelled due to informing the supplier of her illness, or that she was denied boarding. In each circumstance this leads to the same conclusion that no refund was applicable.

Miss L says she wasn't told she could change or transfer the holiday. This is because the terms she agreed meant she could do neither of these things by the time she found out she was sick. So she didn't lose out due to this.

Miss L has supplied and pointed to the Package Travel and Linked Travel Arrangements Regulations 2018. I've considered these. However I should note the parts she's pointed to don't apply to her specific situation of being sick at the point of travel. Suppliers and airlines are entitled to protect their services and their customers from people who are either too sick to travel or a risk to other passengers due to illnesses. Miss L has lost out here clearly but she hasn't been treated unfairly by Aqua.

Miss L also points to Sale of Goods Act and the Consumer Rights Act and other legislation. None of these make a material difference to Miss L's situation. She has not lost out due to the way Aqua has considered this matter. She has lost out due to becoming sick at the point of travel and fairly not being refunded. I appreciate she will be disappointed here however she has been treated fairly by Aqua.

I should add that although Miss L is clearly invested in this matter and clearly feels the package supplier are at significant fault, she hasn't persuasively demonstrated why Aqua's position on the holiday itself is unfair bearing in mind the terms and conditions she agreed. And it has to be remembered this dispute and this decision is about how Aqua treated Miss L only.

I do appreciate that this isn't the decision Miss L wants to read. And that it leaves her disappointed. But that doesn't make it fair for Aqua to cover this disappointment regarding her holiday through refunding her either as a result of how it considered chargeback or S75. I'm not persuaded a breach of contract or misrepresentation has been made out here due to the terms and conditions in place. And I don't think any chargeback raised would have been successful on these facts. I appreciate Miss L was disappointed but she has fallen substantially short of being persuasive on the legal position here. The contracted operator fairly in her not being refunded having considered all relevant evidence, facts law and regulation. Accordingly Miss L's complaint about Aqua is unsuccessful.

My final decision

For the reasons set out above, I do not uphold the complaint against NewDay Ltd, trading as Aqua. It has nothing further to do on this matter.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss L to accept or

reject my decision before 7 October 2024.

Rod Glyn-Thomas
Ombudsman