

The complaint

A company, which I'll refer to as M, is unhappy that chargebacks were raised against it after the 'Customer Not Present' (CNP) transactions it accepted turned out to be fraudulent. M believes that Elavon Financial Services Designated Activity Company (Elavon) are substantially to blame for what happened because they failed to fully advise M of the risk of chargebacks.

In bringing this complaint, M is represented by its director who I'll refer to as Mr S. He, in turn, is represented by solicitors, who I refer to as H.

What happened

There's little dispute between the parties about the core events in this case. So, I won't repeat them in detail. In summary, the key details are as follows:

- On 5 December 2019 in order to facilitate card payment services, M entered into a Merchant Services Agreement with Elavon (the Agreement).
- In December 2022, M began supplying a considerable amount of goods to a customer. M has told us that whereas on average, it had been doing up to 30 transactions per day with a total value of £6,000, towards the end of December 2022, the transaction amounts increased significantly.
- So, on 22nd December Mr S contacted Elavon and enquired about certain specific CNP transactions. Mr S explained that he wanted to confirm whether the transactions had "gone through".
- In the course of the conversation, Elavon gave assurances to that effect and according to Mr S, M continued accepting orders from the same customer which eventually totalled in excess of £62,000.
- Unfortunately, the transactions turned out to be fraudulent and were subsequently disputed by the genuine cardholder. So, they were charged back to M.
- M didn't think that was fair. In particular in light of the assurances Mr S received from Elavon when he spoke to them on 22 December 2022. So, on behalf of M, Mr S complained to Elavon. By way of compensation Mr S requested full reimbursement of the chargeback amount for which M was being held responsible.

Elavon acknowledged payments were accepted by M in good faith and that at the time M had no knowledge that these were fraudulent. But they said in accordance with the relevant Card Scheme rules, all financial transactions processed as CNP are done at the customer's own risk. And furthermore, that means that the customer is financially liable for such transactions.

Regarding the call Mr S made to them on 22 December 2022, Elavon said – in summary:

- Mr S told Elavon that M had accepted various transactions and as noted above, he wanted to confirm they had gone through.
- More specifically, Mr S mentioned transactions for £1,447.74 and £1,405.50. And he asked if M was guaranteed to receive the funds. In response Elavon advised the transactions looked fine. In addition, Elavon said that an authorisation code had been received which meant the cardholder's bank accepted the transactions and in turn that meant M would receive the funds the following day.
- Mr S asked Elavon to check two more transactions for £1,734 and £2,926. In respect of both of these transactions Elavon confirmed they too were authorised, and M would receive payment the following day.
- Mr S did not tell Elavon he suspected or were concerned about the transactions being fraudulent. But that being said, more information could have been provided regarding the authorisation code. In particular, that it does not guarantee payment and that CNP transactions are accepted at M's own risk.
- In this regard Elavon relies on the terms and conditions of the Agreement. In particular this:

"Important Principles and Obligations for accepting card payments" - which says:

"The Customer must obtain an Authorisation Code via an electronic terminal or similar device before completing any Transaction. The Customer understands that an authorisation code is not a guarantee of acceptance or payment of a transaction. Receipt of an authorisation code does not mean that the customer will not receive a chargeback for that transaction.

The Customer further understands and acknowledges that the acceptance of Card Not Present Transactions is done entirely at their/its own risk."

That being said in acknowledgement that in the circumstances of this case, there were failings on their part, Elavon offered M £5,000 in compensation.

But M didn't think the compensation went far enough and as its complaint remained unresolved H, on its behalf referred it to this service to look into.

One of our investigators looked at this complaint. But she felt the response Elavon had issued to the complaint – including the offer of £5,000 compensation, represented a fair outcome. But in addition, she made some further points – which I summarise. She said:

- There is a high degree of risk associated with CNP transactions which M would have been made aware of in the Agreement which Elavon has pointed to.
- In deciding therefore to accept CNP transactions, the onus was on M to ensure that it understood the risks when accepting these types of transactions – and to take the appropriate steps to mitigate them. So, Elavon had done all that could be expected of them by giving M the appropriate information ahead of the transactions on what CNP payments involve and how they should be handled.
- She acknowledged that through Mr S, M sought advice as to whether the transactions in question had gone through. And in particular that it wanted an

assurance there were no issues with the transactions and that the funds would be guaranteed.

- She believed when questioned, Elavon correctly said the transactions were authorised. However, she didn't think this amounted to more than confirmation there were funds available, and the card hadn't been reported lost/stolen at the time.
- She accepted Mr S did ask for assurances regarding the authenticity of the transactions. And she believed Elavon could have done more to advise Mr S of the risks associated with these payments during the telephone conversation of 22 December 2022. But she believed Elavon's offer of £5,000 was fair in the circumstances. In particular because:
 - Ultimately it was M's responsibility to take appropriate measures to ensure the authenticity of the CNP transactions.
 - If Mr S, had concerns about the transactions, he could've asked more specific questions about how best to safeguard M and/or ensure the transaction was genuine.
 - But it's fair for Elavon to accept some responsibility for what happened when Mr S called on 22 December 2022 and offering £5,000 for their failings is fair

M didn't accept the investigator's conclusions, and, on its behalf, H responded to say - in summary:

- M suffered significant losses – in the region of £62,000 as well as £750 worth of administrative charges. In the circumstances the £5,000 offered by Elavon is unreasonable.
- M accepts extra care was needed with CNP transactions. But M did so, in the sense Mr S contacted Elavon to ask whether or not the payments that had been made were authorised. He was not told there would be chargebacks if the transactions weren't allowed. Indeed, Mr S was given the impression the payments had been authorised and would be honoured.
- Since Mr S's purpose in contacting Elavon was to make sure the payments would be honoured, if issues were highlighted, M would not have taken further orders.
- The call transcript shows no warning was given to Mr S that payments made would have to be returned in the event they were challenged by way of chargeback. Mr S relied upon there being no mention of chargebacks and in particular confirmation that the funds were cleared in M's account.
- M relied on Elavon's expertise, and they should have warned Mr S of the possibility of chargebacks. M should not be significantly out of pocket due to Elavon's failure to protect it

While considering the complaint, I suggested to Elavon that they should pay additional compensation to M. This was intended to reflect what I regarded as poor service in respect of the four transactions Mr S asked them about on 22 December 2022.

As well as the two transactions Elavon were asked about initially: ie £1,447.74 and £1,405.50, I noted that towards the end of the call Elavon were also asked about a further two transactions: £1734 and £2926. Elavon gave the same assurance to Mr S in respect of those

transactions also. And the assurance was that they had authorisation codes and therefore all should be ok.

I believed therefore that it was fair that Elavon should compensate M for all four transactions since they gave the same poor service in respect of all four transactions. I believed that based on Elavon's advice, M had a reasonable expectation that all four transactions Mr S asked about would be paid.

Added together, the four transactions came to £7,513.24. And since Elavon had already offered £5,000, I took the view they ought also to pay the extra £2,513.24.

Elavon said they were willing to offer that sum too, meaning they would pay M a total amount of £7,513.24.

But after putting the proposed settlement to M, it declined to accept it.

H said M incurred substantial losses as a result of the failures on the part of Elavon and they could have been avoided if Elavon had given Mr S correct advice.

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.

Where the evidence is incomplete or inconclusive (as indeed 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.

For context I start by explaining briefly what a chargeback is.

A chargeback is the reversal of a previously cleared transaction. It is a process by which some disputes are resolved between card issuers and merchants under the relevant Card Scheme rules. And chargebacks are an unfortunate but inevitable consequence of on-line transactions.

It's important to note, however, that the decision whether or not to approve chargeback claims is for the Card Scheme to make and I'm unable to consider whether that decision is wrong or right.

I'm aware that at the heart of M's case are three main elements:

- Elavon failed in their duty to protect M given their relative expertise in card transaction matters
- On 22 December 2022 Mr S contacted Elavon to determine whether or not the payments that had been made were being authorised and received assurances to that effect. Elavon failed to warn Mr S of the possibility of chargebacks. In other words that the payments would have to be returned in the event they were challenged.
- Elavon's failure meant M's losses were exacerbated because it continued to take orders.

Elavon have pointed to the terms and conditions of the Agreement in relation to the effect of an authorisation code being received for a transaction.

I agree with the investigator's comments regarding the effect of 'authorisation'. Having read the Agreement in full I'm satisfied it makes clear that acceptance of CNP transactions is done entirely at the customer's own risk. And furthermore, that authorisation doesn't guarantee payment for a transaction or guarantee that the transaction won't be disputed at a later date given that all transactions are subject to chargebacks.

I think it's reasonable to conclude that having signed the Agreement on 5 December 2019, Mr S was aware or at least ought reasonably to have been aware that CNP transactions were not guaranteed. More to the point, I've seen nothing in the Agreement to indicate Elavon assumed any duty or that any responsibility was placed on them to protect M in relation to CNP transactions.

22 December 2022 call

M has placed considerable importance on this call, primarily because it thinks Elavon gave certain assurances regarding the transactions which led to M taking more orders.

Since the actual call recording is not available, I too have relied on the transcript. My starting point here is that if a customer of the bank asks it for information or advice, then the bank has an obligation to make sure the advice or information it gives is clear and accurate.

So, as well as reading the call transcript I've thought about whether in the phone call Elavon made errors.

Elavon's interpretation of the call was that:

- Mr S acknowledged M had accepted transactions for £1,447.74 and £1,405.50 and asked if they were confirmed transactions and if they were okay. Elavon said in response that the transactions were authorised.
- And in response to Mr S's further question if M was guaranteed to receive the funds, Elavon advised the transactions looked fine, that M had received an authorisation code meaning the cardholder's bank accepted these transactions so M would receive the funds the following day.

I accept that was indeed the nature of the conversation on 22 December 2022. Mr S was initially looking for an assurance regarding two transactions and Elavon confirmed the transactions were authorised and M would receive the funds.

Elavon's position is that the advice given could have been clearer. And I agree. Elavon assured Mr S that based on the authorisation code, the transactions were effectively guaranteed payment. But that assurance was wrong as is made clear in the Agreement under "Important Principles and Obligations"

The conversation went further in that Mr S asked about two other transactions which he wanted to be checked – which were:

- £1734 and
- £2926.

The transcript records Elavon's response as follows:

“1734 ok, 1012 ok, so I can see the first one and its [the] same situation we have auth code so the first one for sure is okay. The second one yes, on both of those transactions we have auth code, there is no rejection from the card holder’s bank so all should be ok.”

Mr S responded as follows:

“Okay excellent. I have [a] few more in the same situation but am happy as you told me those 4 were okay so [the] rest should be fine.”

But here too, in respect of the last two transactions Elavon made the same error in the advice they gave to Mr S.

I find therefore that in respect of all the four transactions that Mr S asked Elavon about, contrary to what reasonably would be expected of Elavon in light of their relative expertise when it comes to chargebacks, Elavon incorrectly advised Mr S. They assured him that because the four transactions had authorisation codes, payment was guaranteed when they were not.

That being said, I haven’t been persuaded that Elavon gave similar assurances in respect of any other transactions. In particular, I’ve come to that view in light of Mr S’s comment above which was made at the end of the call on 22 December 2022.

To be clear, I’ve seen no evidence that after commenting as he did at the end of the call, Elavon gave Mr S any reassurance regarding other transactions.

M has explained it now faces losses in excess of £60,000 for which I very much sympathise. But I don’t think I can reasonably require Elavon to compensate M for the full extent of those losses. Beyond the finding I’ve made in respect of the four transactions highlighted above, as I’ve just said, I’ve found no evidence Elavon gave advice in respect of any other transactions. So, I don’t think it would be fair to hold Elavon liable for those losses.

I appreciate that M will be disappointed with that conclusion and what ultimately it means for the outcome of its case. And I understand and sympathise with what M has been through, particularly as the CNP transactions turned out to be fraudulent.

However, having carefully considered the evidence I’ve seen from both parties, apart from the four transactions I’ve identified above, I’m satisfied Elavon have acted correctly within the Card Scheme rules to which they’re bound, as well as the terms and conditions of the Agreement in holding M liable for the chargebacks in this case.

Putting things right

Elavon have offered to pay £7,513.24, in compensation to M. This includes the additional £2,513.24 I recommended. I consider Elavon’s offer to be fair compensation in the circumstances of this case. So, I won’t be requiring them to do more

My final decision

My final decision is that in full and final settlement of this case I require Elavon Financial Services Designated Activity Company to pay £7,513.24 to M.

Under the rules of the Financial Ombudsman Service, I’m required to ask M to accept or reject my decision before 25 November 2024.

Asher Gordon
Ombudsman