

The complaint

Mr A complained because Marks and Spencer Financial Services Plc, trading as M&S Bank, refused to refund him for credit card cash withdrawals which he said he didn't make.

What happened

On 3 April 20223, Mr A rang M&S. He said that he hadn't made three cash withdrawals which had been debited to his M&S credit card. They were all for £250 at the same cash machine at a supermarket local to Mr A, and had taken place on 17 February, 3 March and 30 March. Mr A told M&S that his card had always been in his possession, and that he hadn't shared the card with anyone else. He also said he hadn't told anyone his PIN or written it down.

M&S refused Mr A's claim for a refund. It said Mr A could go to the police, which he did. The police and Action Fraud didn't take the case further. There was further communication between Mr A and M&S. In M&S's final decision letter to Mr A on 19 May, it confirmed its original decision not to refund Mr A. It said this was because Mr A had said the card had remained in his possession, and he hadn't disclosed his PIN. It also said that the transactions were made on numerous dates, with genuine usage of the card in between.

Mr A wasn't satisfied and there were further exchanges between Mr A and M&S about various points. Mr A said that he'd destroyed the card, but had been told by an M&S adviser that there had been failed attempts with the old card after the date when Mr A said he'd destroyed it. He was also unhappy with the service, for example not returning calls, and not telling him when a customer service adviser he'd spoken to had changed job. Mr A was also unhappy that M&S hadn't itself contacted the police direct about his complaint.

M&S refunded Mr A with the interest, and cash advance fees, relating to the three cash withdrawals. It also paid him £150 in June and a further £350 in October, as an apology for the service. But it didn't refund him for the £750 for the three disputed cash withdrawals.

Mr A wasn't satisfied and contacted this service.

Our investigator didn't uphold Mr A's complaint. She said that the disputed withdrawals had been authenticated using Mr A's genuine card and correct PIN. Only one card was active at the time of the withdrawals, and Mr A had said no-one else had access to his card, or knew his PIN. So the investigator said it wasn't plausible that any third party could have made the withdrawal.

The investigator also noted that Mr A had said the card had been used after he destroyed it, with two withdrawals and a contactless payment attempted within 40 minutes of each other, at the supermarket used regularly by Mr A. The investigator said she wasn't convinced the card had been destroyed as Mr A had said. She said the withdrawals weren't typical of a fraudster as there were thousands of pounds of available credit on Mr A's account at the time. She also pointed out that Mr A had logged into his mobile banking on 28 February, 20 and 21 March – so he'd have known about the withdrawals before he reported them to M&S on 3 April.

Mr A didn't accept this, and sent a long and detailed email. He said he was extremely disappointed and there were several anomalies, for example how the card had been used for further attempted withdrawals after he'd destroyed it. He disagreed that he'd have known about the transactions because he'd logged on, saying that he always cleared his full balance and looked at the balance on the last page. He'd noticed the transactions on his April statement because of the interest and cash advance charges. He also asked why he'd been told to contact the police, if M&S wasn't going to bother contacting the police. He said he didn't trust M&S, who had wasted his time. He said he needed evidence of what M&S did in its investigation, including whether the actual card and PIN were used. He said he wasn't told about the further attempted withdrawals as promptly as she should have been. And he said there were articles about card skimming and suggested we should speak to the police about how criminals can clone cards.

Mr A asked for an ombudsman's 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.

As I've set out above, Mr A has raised multiple points in his submissions to the service. I've understood all of those and considered all he's said and sent us, but in reaching my decision here I've focused on what is vital to my conclusions.

The relevant legislation for disputed transactions on a credit card is section 83 of the Consumer Credit Act 1974. This says that a consumer is not liable for a loss from the use of a credit facility unless they, or someone acting as their agent, has carried out the transaction. So the relevant factor here is whether Mr A, or someone acting on his behalf, is more likely than not to have carried out the three disputed £250 cash withdrawals.

I've seen computer evidence which shows that the genuine chip was read when the cash withdrawals were made. In this context, I considered Mr A's comment that the card could have been cloned. But I find it unlikely in the circumstances of this case. It's not generally thought possible to copy the chip on a card, and our service hasn't come across any cases where we felt this was a likely explanation of what happened. I haven't seen any evidence Mr A's card was cloned. I'm satisfied the payments were made using Mr A's original card, the same one he was using for genuine payments around the same time.

I have also seen computer evidence which shows that Mr A's correct PIN was used for the three disputed cash withdrawals. Mr A told M&S that he hadn't disclosed this to anyone, and hadn't written it down. There are 10,000 possible combinations of a four-digit number like a PIN. So it's most unlikely any fraudster would have been able correctly to guess Mr A's PIN.

In view of these factors, I can't see how any third party could have carried out the disputed withdrawals. To do so, they'd have had to steal Mr A's card on three occasions and return it to him promptly without his knowledge, because Mr A was also using the card for undisputed transactions, in the same geographical area, throughout this time.

At the time of the withdrawals, there was a large amount of available credit not used. This varied from day to day and Mr A spent money, but for example on the statement dated 1 March the available credit was over £11,000. So I consider it most unlikely that any hypothetical fraudster who had access to Mr A's card and PIN would have stopped at £250 when they could have had around £11,000. Similarly, I can see no reason why any such

fraudster would have returned Mr A's card to him after stealing each £250 – this would have carried a high risk of being caught. It isn't plausible that this would have happened.

Mr A claims that when he logged onto his mobile banking on 28 February, 20 and 21 March, he didn't see the disputed transactions. He says the reason was that it was only when he saw the interest charged and cash advance fees on the statements that he noticed. Certainly Mr A used his card frequently, so there were a lot of transactions. But the interest charged and cash advance fees were debited straightaway with the cash withdrawals – not just added at the end of the charging period. And also, most of Mr A's other transactions were smaller, so the £250 withdrawals would have stood out. The dates he logged on were also not the dates when he needed to make payments, so the reason he logged on must have been to look more generally at his account, not just at the figure at the bottom of the page, especially as he was nowhere near his credit limit. So I find it unlikely that Mr A wouldn't have seen the disputed transactions when he logged on – but didn't report them as disputed until 3 April.

Taking all these factors into account, I consider it was more likely than not that it was Mr A, not a third party fraudster, who carried out the disputed cash withdrawals. So M&S doesn't have to refund him.

Finally, I've considered Mr A's general and customer service points in his response to the investigator's view, which I've listed above. What matters here in terms of the outcome is the specific issue of who authorised the transactions. The outcome isn't decided by Mr A's other points about matters such as allegedly having destroyed his card himself, but there then being failed transactions. I think it's most likely that Mr A didn't destroy the card – but this isn't relevant to the outcome. Nor is it relevant to the outcome exactly what M&S did in terms of its investigation and whether it was in touch with the police, which M&S doesn't have to disclose to Mr A. Nor did it have to tell him about the failed withdrawals after the card was stopped. I've seen the technical evidence, and am persuaded that this points to Mr A being the most likely person to have authorised the transactions.

I've considered the amount of compensation which M&S paid to Mr A for customer service issues such as not returning calls. M&S refunded Mr A for the interest on the disputed transactions, and the cash advance fees, plus a total of £500. I consider that this was more than generous in all the circumstances of this case, and I don't require M&S to do more.

My final decision

My final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr A to accept or reject my decision before 4 June 2024.

Belinda Knight
Ombudsman