

The complaint

Mr H complains that Lloyds Bank PLC won't refund him for disputed transactions carried out on his account.

What happened

Mr H explained that the disputed transactions were carried out between 19 July until 22 July 2022 whilst he was unwell in hospital. I won't list all the transactions here as they are well known to both parties. All were made using his debit card.

Mr H has explained he became suddenly unwell whilst in his car and was taken to hospital. Although he took his car keys with him, he left his phone and wallet inside the car, and due to the circumstances at the time, he left his car unlocked. When a family member went back to check the car, his possessions had gone.

Lloyds declined to refund Mr H. They said the transactions had been carried out using Mr H's card and PIN. As Mr H had told Lloyds he didn't have his PIN written down, Lloyds said there was no explanation how someone else would have known this and therefore been able to carry out the transactions.

Our investigator said she didn't think the transactions had been made or authorised by Mr H. However, Mr H told our service that he can sometimes be forgetful so his PIN could have been recorded in his phone disguised, or written on a piece of paper, although the number would have been disguised.

Our investigator noted the correct PIN was entered the first time, so she thought the PIN wasn't disguised or wasn't disguised well enough. She therefore concluded that Mr H had acted with gross negligence and therefore should be held liable for the transactions. However, as one of the transactions took Mr H's account into his overdraft facility, she explained Lloyds should refund this along with any interest charges.

Lloyds disagreed. They said Mr H had provided conflicting information about the PIN. They also questioned how someone would be able to access this if it had been recorded in Mr H's phone as they would have needed access to his passcode – if he had one. Lloyds also wanted evidence of Mr H's hospital stay.

I reviewed the complaint and issued a provisional decision on 9 February, an extract of which is included below:

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

Although I'll never know for certain what happened here, I have looked at everything Mr H and Lloyds have provided to determine what I think is more likely than not to have happened.

The relevant regulations here – the Payment Services Regulations 2017 – say that generally

a consumer won't be held liable for any transactions made on their account that they didn't authorise, except in limited circumstances. In this case the most important question I need to answer is whether I think it's more likely than not Mr H, or someone acting on his behalf, carried out the transactions.

Having reviewed the evidence available, I don't think Mr H (or someone acting on his behalf) carried out the transactions. I say this because:

- Mr H has provided consistent testimony that he was suddenly taken ill to hospital. I can see at the time he reported the transactions to Lloyds this is what he told them, and it is also what he told our service. Although Lloyds would like to see evidence of his hospital stay, I am persuaded that this version of events likely happened.*
- I'm also persuaded that Mr H had a written record of the PIN that wasn't disguised well. I say this because the PIN seems to have been entered correctly when the disputed transactions began. In addition to this, the PIN history shows Mr H's card had been blocked twice in recent years due to three failed attempts. So this does suggest Mr H may have had trouble remembering it and so wrote it down. I also note that the PIN that was activated after this point wasn't one Mr H selected himself so it wouldn't have been a memorable date for example that he'd have been more likely to recall. Mr H has also said, as the complaint has progressed over time, that he did keep a record of his PIN.*

So it seems more likely than not it was recorded, and in a format someone could decipher. I appreciate that's not what he told Lloyds at the time he reported the transactions. And I appreciate Lloyds would like to know more about how the PIN was stored in Mr H's phone, but I don't think this matters because I think in any case Mr H had this written down somewhere else which was easily accessible to the fraudster.

- Looking at the transactions that took place, it does seem in line with the pattern of an opportunistic fraudster. I say this because, along with maximizing cash machine withdrawals, there are balance enquiries, failed cash withdrawals and failed point of sale transactions as the fraudster took the opportunity to take as much money as possible.*
- Mr H has also said he reported this to the police which I think adds weight to his overall testimony.*
- There is no evidence to suggest someone acting on Mr H's behalf carried out the transactions. I'm satisfied he accidentally left his possessions behind in light of the circumstances and there is nothing to suggest he actively gave his card and PIN to anyone.*

So taking everything into account I don't think Mr H authorised these payments, and therefore I find they were unauthorised.

Gross negligence

I also have to consider whether Mr H acted with "gross negligence". The Payment Services Regulations 2017 says a consumer (such as Mr H) should take all reasonable steps to keep safe personalised security credentials relating to a payment instrument. Our service would consider gross negligence to be a lack of care that goes significantly beyond what we would expect from a reasonable person.

Based on the information Mr H has told us, I'm persuaded he has failed with gross negligence to meet his obligations as a payment service user. I say this because Mr H took his card and PIN out of home and his PIN doesn't seem to have been disguised well, if at all, which enabled the fraudster to carry out the transactions.

In addition to this, Mr H left his card and PIN in his unlocked vehicle which was unattended – although I do appreciate that the event was unforeseen. However, it was the action of Mr H recording the PIN together with his card which is grossly negligent. And having the card and PIN together which fell into the wrong hands was reasonably foreseeable.

It's worth noting that Lloyds' records show there were no failed PIN attempts. In other words, every attempted transaction was done so with the PIN entered correctly each time. Based on the evidence in front of me, I can't see how else an opportunistic fraudster would know the PIN without it being recorded in this way. If it was disguised in some way, it seems more likely than not it wouldn't have been correctly guessed at the first attempt.

In summary, I think it's more likely than not Mr H kept a clear record of his PIN. To my mind, this is more than mere 'negligence'. I'm satisfied Mr H's likely lack of care goes significantly beyond ordinary negligence or carelessness and is therefore grossly negligent. As I've said before, this would mean Mr H ought to be held liable for the transactions – although he may not be liable for all, as explained further down.

I have considered what Mr H has told us about his medical history, in particular that he wrote his PIN down because he can be forgetful. But I don't think this makes a difference. I say this because Mr H doesn't appear to have taken steps to notify Lloyds of his condition so that adjustments could be made to benefit him. And Mr H hasn't described a condition or impacts of a condition that would appear to significantly affect his day to day life. It follows that I don't think it would be fair or reasonable to say the gross negligence consideration ought not to be applied here.

Was contactless involved?

Lloyds' records indicate that some of the disputed transactions were carried out using contactless rather than chip and PIN. The contactless transactions could be made by anyone who came across the card (so the gross negligence argument isn't as relevant in these particular circumstances). It follows that I think Lloyds needs to refund the transactions that were authenticated using this method.

Based on Lloyds' internal records, my understanding is that this would apply to the following transactions:

20 July 2023	£31.25
	£22.80
	£33
21 July 2023	£6.10
	£25.10
	£20.95
22 July 2023	£10.70

Is credit involved?

As some of the spending involves the use of credit there are additional protections through the Consumer Credit Act which mean that a customer can't be held responsible for any

unauthorised spending from their account, even when gross negligence may be a factor. This means Lloyds should refund any transactions that took Mr H's account into his overdraft facility.

Having looked at the statements, there was one transaction which took his account into overdraft, which was the last transaction for £235.08. Lloyds should refund this along with any associated overdraft interest.

Should Lloyds have done more?

I've considered whether Lloyds should have done more to protect Mr H from financial harm. However, having looked at his statements I don't think the transactions were sufficiently unusual that Lloyds should have intervened.

Conclusions

So after weighing everything up, I don't think Mr H authorised the transactions in dispute. But he did fail with gross negligence to protect his security credentials and should as a result be liable for most of the payments – apart from the payments that were authenticated by contactless and the last transaction which took his account into his overdraft facility”.

I asked both parties to provide me with any additional comments or information they would like me to consider by 23 February 2024. Lloyds replied to say they agree to pay the partial balance of £149.90 for the contactless transactions that were made.

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.

Because neither party have provided me with any further information, I see no reason to depart from the conclusions that I reached in my provisional decision. It remains that I think Lloyds should refund all of the contactless payments along with the last transaction which took Mr H into his overdraft facility.

My final decision

My final decision is that I uphold this complaint in part. Lloyds Bank PLC should put things right as I've explained above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr H to accept or reject my decision before 19 April 2024.

Marie Camenzuli
Ombudsman