

The complaint

Mrs M complains that NewDay Ltd is holding her liable for transactions she says she didn't authorise.

What happened

The background to this complaint is well known to both parties, so I won't repeat everything here. In brief summary, in April and May 2023, respectively, two transactions of £2,421.38 and £812.58 were charged to Mrs M's NewDay credit card, with accompanying respective transaction fees of £71.43 and £23.97. Mrs M has said she didn't authorise these transactions.

Mrs M and NewDay were unable to reach agreement about things, so Mrs M referred her complaint about NewDay to us. Our Investigator was unable to resolve the matter informally, so the case has been passed to me for a 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.

Having done so, I've decided to uphold this complaint for materially the same reasons as our Investigator. I'll explain why.

The Payment Services Regulations 2017 and the Consumer Credit Act 1974 are relevant here. In short, a payment service provider here, like NewDay, will generally be liable for unauthorised payments. A payment out of someone's account can only be authorised if the payer consented to it. So, whilst I understand these transactions were authenticated using Mrs M's long credit card number and CVV, this isn't enough, by itself, to say these disputed transactions were authorised. To decide that Mrs M authorised the transactions, I'd also need to be persuaded she most likely consented to them.

Where I can't be sure about something, I need to make up my mind based on the balance of probabilities – in other words, based on what I think most likely happened, taking into account all the evidence and arguments. And, in this case, I think it's most likely that Mrs M did not consent to these transactions. I say this because:

- The transactions were charged to Mrs M's credit card as a result of Mr M's (her husband's) contact with a third party I'll call X. I understand Mr M was first in touch with X in April 2023, when he expressed interest in their advertised online training programme, and booked an enrolment call. NewDay has presented evidence X has provided, in which X purports to show that Mr M, on the same day as the enrolment call on 26 April 2023 as I understand matters, signed a contract with an agreed fee of \$6,000 for X's services, with \$3,000 being due on 27 April 2023, and then a further \$1,000 payable every 30 days until the \$6,000 was paid. Mr M says X's evidence is falsified. And it's difficult to know exactly what happened here, and who is telling the truth. However, Mr M has said that during the enrolment video call with X, he

expressed concern about the price of the programme and he was consequently offered a free one-month trial. He's said he asked how this would work and was told that it was a small platform and upon the end of the free trial he would simply be asked to make payment if he wanted to maintain access to the programme. I wouldn't find it surprising that Mr M would have expressed concern about the price and I find what he's said about this plausible.

- Mr M has said that during the enrolment video call, he was asked to show his driving licence or passport for identification purposes, but he expressed concern about doing this. So, Mr M says, X then asked if he could show a credit card instead, for identification purposes. Mr and Mrs M's submissions are that Mr M then shouted down the stairs to ask Mrs M if he could use her credit card for this purpose; and that Mrs M said yes, but at no point did she provide consent for her card to be used to make a payment, nor did they expect transactions to be made. Mr M has said that he then showed X the front of the card, but X then asked to see the signature on the back of the card to check its authenticity; and although he tried to place his finger over the CVV code when showing this, he didn't manage to.
- It's possible that Mr and Mrs M aren't being truthful about things. But overall, I am persuaded that Mr M most likely didn't want to commit to such large fees at such an early stage, and that what he's said about him being told he could have a free trial on the enrolment video call is what most likely happened. I'm also not satisfied here there is enough evidence for me to say Mrs M consented to the transactions.
- I've thought really carefully about the evidence provided by X, the fact Mrs M didn't report the transactions as unauthorised until June 2023, and the points NewDay made in response to our Investigator's assessment which included that X's evidence shows Mr M did provide photo identification and attended the course, and that there has been no evidence provided that there was a 30-day free trial. But these points don't change my mind. The photo identification Mr M provided X with during the onboarding process wasn't his driving licence or passport so this doesn't refute what he's said about that. And the fact Mr M initially engaged with the programme (which Mr M has acknowledged, albeit he became dissatisfied with it quickly) for a period of around one month, doesn't refute what he's said about the free trial, nor prove the transactions were consented to. And X's evidence overall, bearing in mind what I've said above, doesn't persuade me on this either. I wouldn't expect there to be evidence beyond what Mr M has said about the 30-day free trial period if he was just told this on the enrolment video call. And whilst Mrs M may have disputed these transactions earlier, I'm not persuaded this sufficiently suggests Mrs M may have consented to them.

This means, for the reasons I've explained, I'm satisfied I can't fairly say Mrs M consented to these transactions, nor therefore that they were authorised. Under the Consumer Credit Act 1974 (sections 83 and 84 in particular), this wouldn't prevent Mrs M from potentially being held liable for these unauthorised transactions by a person who acquired possession of her physical card with her consent. But I'm not persuaded this applies here, where the card wasn't in the possession of X, and where I'm satisfied the transactions weren't consented to.

I've therefore decided to uphold this complaint and to direct NewDay to refund to Mrs M the disputed transactions totalling £3,329.36 (inclusive of the transaction fees).

Given these transactions were applied to Mrs M's credit card account as extra debt, NewDay should also:

- refund to Mrs M any interest and charges incurred as a result of these transactions; and
- pay Mrs M interest calculated at 8% simple per year on any repayments Mrs M made to pay off the extra debt of £3,329.36 from the date of the repayments to the date of settlement (if NewDay deducts tax from this interest, it should provide Mrs M with the appropriate tax deduction certificate); and
- remove any negative reporting on Mrs M's credit file (if any) incurred as a result of these transactions.

My final decision

For the reasons explained, I uphold this complaint and I direct NewDay Ltd to:

- refund to Mrs M the disputed transaction totalling £3,329.36; plus
- refund to Mrs M any interest and charges incurred as a result of these transactions; plus
- pay Mrs M interest calculated at 8% simple per year on any repayments Mrs M made to pay off the extra debt of £3,329.36 from the date of the repayments to the date of settlement (if NewDay deducts tax from this interest, it should provide Mrs M with the appropriate tax deduction certificate); and
- remove any negative reporting on Mrs M's credit file (if any) incurred as a result of these transactions.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs M to accept or reject my decision before 19 July 2024.

Neil Bridge
Ombudsman