

The complaint

Mr D complains about how NewDay Ltd trading as Aqua did not refund him for a transaction.

What happened

The parties are familiar with the background of this complaint – so I won't be covering this in detail here. It reflects my informal remit.

In summary, in November 2021 Mr D paid an online booking agent ('the supplier') for a hotel room using his Aqua credit card. He says that because of the pandemic he did not want the booking any longer and cancelled. He says the supplier didn't issue him a refund so he approached Aqua for help.

Aqua raised a chargeback, but discontinued that when it was defended by the supplier. Aqua then considered a claim under Section 75 of the Consumer Credit Act 1974 ('Section 75') but rejected this. It said there was not the correct 'debtor-creditor-supplier' agreement for a valid claim.

Mr D was not happy with the outcome of his claim so complained to Aqua. It decided not to uphold his complaint but paid him around £40 of interest as a gesture of goodwill.

Mr D referred the matter to this service. Our investigator thought Aqua should rework Mr D's card as if the charge for the hotel room had not been made and pay him 8% simple yearly interest on any credit balance.

Aqua then paid Mr D the following amounts:

£414.34 for the hotel booking.

£272.42 in interest.

Mr D has asked for the matter to be referred to an ombudsman. He says he wants additional compensation as he has been prevented from having access to his money for about two years which has caused him a lot of distress and inconvenience. He says he has had to continually repeat himself which has caused him distress.

The matter has now come to me to make a decision on. I issued a provisional decision on this case which said:

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

My role here is to resolve disputes informally – so I won't be commenting on everything the parties have said – only what I consider key.

I am sorry to hear about the difficulties Mr D describes with the hotel booking and attempts to get refunded. But it is important to note here that Aqua is not the supplier of holiday services.

When considering what is fair I am looking at its role as a provider of financial services – and what it can fairly be held accountable for noting its role handling a dispute claim, the relevant chargeback dispute rules or the legal provisions of Section 75.

Was Aqua holding on to Mr D's money unfairly?

Mr D appears to be implying that the supplier had actually refunded the card but Aqua had done something to prevent this happening, or held onto the money. And I want to make it clear that I see no persuasive evidence this was the case either at the time Mr D approached Aqua to raise the initial dispute (around November 2021), or during the handling of the chargeback and later Section 75 claim (which I understand was first concluded in March 2022).

If Aqua had already received the refund from the supplier, I don't see why it would not have simply processed it into Mr D's account. In fact the evidence I have indicates that the supplier didn't agree to or issue the refund back to Mr D's card during the initial claim handling period.

It seems it was only after the claim had been considered, into late April 2022 when the supplier agreed to issue a refund – but there is no persuasive evidence this refund occurred either.

Overall, I can't fairly conclude that Aqua has been holding on to a refund that it had all along or prevented the supplier from issuing the refund. I think that at the time Mr D approached Aqua it wasn't unreasonable to approach this as a chargeback or Section 75 claim. So I turn to how it handled these things.

Chargeback

Chargeback is only able to recover the amount Mr D paid on the card. And now Mr D has already had that refund I don't consider it necessary to go into chargeback in great detail. However, I will cover it insofar as to determine if Aqua has handled the chargeback dispute poorly and in such a way which caused Mr D additional detriment.

Chargeback is governed by particular rules set down by the card operator. In this case it appears Mr D used a Mastercard so I have thought about these relevant scheme rules in coming to my findings here.

I note Aqua raised a chargeback which was defended by the supplier. It isn't clear what Mastercard reason code Aqua used to raise the chargeback. Some evidence points to Mr D originally raising the dispute as a duplicate transaction, whereas other information indicates he raised it based on a failure by the supplier to refund him after cancellation of a service.

However, regardless of this, I don't think Aqua has acted unreasonably in discontinuing the chargeback, or that its actions deprived Mr D of a refund in any event. I say this because I don't think a chargeback on either of these grounds (or related grounds) had a reasonable prospect of success under the chargeback scheme. In summary, I conclude this because:

- there is no persuasive evidence of a duplicate transaction;*
- the terms and conditions of the booking indicate the service was available to Mr D and non-refundable – so even if Mr D cancelled he wouldn't have a right to a refund;*

- *at the time the chargeback was raised there appears to be no evidence that the supplier had promised to refund Mr D.*

I also can't see that the handling of the chargeback process took excessive time or that there were clear customer service failings by Aqua which would fairly mean it should pay Mr D additional compensation.

Section 75

Section 75 can mean Aqua is liable for a 'like claim' in respect of a breach of contract or misrepresentation by a supplier of goods or services funded by the credit card.

I note that after the chargeback failed Aqua went on to consider a Section 75 claim – which on the face of it was not an unreasonable step to take.

There are certain criteria which must be in place for a valid Section 75 claim as laid down in law, and Aqua decided that these were not in place here – specifically because of the wrong 'debtor-creditor-supplier' agreement.

I am not going to dwell on the 'debtor-creditor-supplier' agreement here. It isn't really that relevant now that Aqua has refunded Mr D for the transaction. And it appears Aqua agrees with the investigator on the matter now. However, for completeness, on the face of it I think there is the correct agreement here, because essentially the involvement of a third party other than the debtor, creditor or supplier, is as a facilitator of the credit card payment between Mr D and the supplier.

The 'debtor-creditor-supplier' agreement isn't necessarily a clear cut issue – so although I disagree with Aqua's conclusions, I don't think that it having a different viewpoint on the matter is reason for compensation in itself.

However, even if Aqua had concluded differently when it considered the Section 75 claim (in March 2022) I don't think it would have then fairly moved on to conclude there was a breach of contract or misrepresentation by the supplier in any event. This is for similar reasons to those I have already mentioned in respect of chargeback. In summary, the booking was non-refundable and there was no indication Mr D was entitled to a refund at that stage.

I can't see where the Section 75 claim took too long to consider, or where there were clear customer service errors by Aqua when it initially looked into the claim. So on the face of it the claim was not handled in such a way that would justify payment of a refund or compensation.

I note it appears after this initial claim handling in late April 2022 the supplier promised Mr D a refund in an email. From what I can see the hotel had a change of heart and decided to waive its cancellation fee despite the booking being contractually non-refundable. It also appears (at least from the wording of its Final Response Letter from July 2022) that Aqua was aware/on notice of this around the time and (even if it had not received the relevant emails from Mr D) it could have looked into this further.

So it follows, that only around the middle of May 2022 (when the refund was due to Mr D and didn't emerge) the supplier had done something which was arguably a breach of contract.

Specifically (via the implied terms in the Consumer Rights Act 2015) a failure to act with reasonable 'care and skill' and pass on/process refunds in respect of its role as a travel agency.

Therefore, I agree that ultimately Aqua should have refunded Mr D, but probably not until around the middle of May 2022 when it would have become clear the supplier had not processed the refund as promised.

Had Aqua not paid Mr D anything to date I would be saying that it should:

- rework the card as if it had refunded the £414.34 on 15 May 2022, refunding associated interest and charges; and*
- if the re-working results in a credit balance Aqua should refund this to Mr D with interest of 8% per year simple calculated from 15 May 2022 to the date of settlement.*

From what I understand Aqua has carried out our investigator's redress – which appears more generous than what I would have proposed. In that it has refunded interest and charges, and run the 8% out of pocket interest award for credit balances from an earlier point in time. So, on the face of it at least some of the additional £272.42 in interest refunded (along with the previous refund of £39.71) is more than I would have recommended in the circumstances here.

I understand that Mr D is unhappy he has waited for his money for a prolonged period – but the redress I have proposed is intended to compensate him for being out of pocket since May 2022 when Aqua could have reasonably done something. It follows, Aqua paying Mr D even more than this adequately compensates him too. And although Mr D wants money for distress and inconvenience on top it must be noted that Aqua's liability only goes so far. It is responsible for breach of contract and misrepresentation by the supplier via Section 75 but this does not necessarily extend to awards for distress and inconvenience caused by the supplier's breach. Aqua's liability via Section 75 is essentially similar to what a court might award against the supplier – and awards for distress and inconvenience in circumstances involving breach of contract are unlikely, particularly considering the nature of the breach in question here.

My provisional decision

I uphold this complaint and direct NewDay Ltd trading as Aqua to pay Mr D on the following basis (as set out below) only in the unlikely event its calculation results in a figure greater than the total amount it has already paid Mr D in connection with this complaint (which I understand is £414.34+£272.42+£39.71):

- rework the card as if it had refunded the £414.34 on 15 May 2022 refunding associated interest and charges; and*
- if the re-working results in a credit balance Aqua should refund this to Mr D with interest of 8% per year simple calculated from 15 May 2022 to the date it refunded Mr D the £414.34 and £272.42 interest following our investigator's view.*

In any event I direct Aqua to provide Mr D with, if appropriate, a certificate of tax deduction for any 8% interest payment it has made to him in respect of the settlement of this complaint.

I asked both parties for their comments.

Mr D said he still wants to be compensated for the 2 years he did not have access to his funds.

Aqua responded to say that it has already re-worked the account and refunded interest charges from 11 January 2022 so no further refund is due.

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 know Mr D considers he has been deprived of his money for a prolonged period. However, as I explained in my provisional decision, I don't think Aqua is fairly responsible for all this time. I have already explained why I think it should have paid his refund sooner – but only from around the middle of May 2022. So I don't think it needs to compensate him for being out of pocket beyond this period.

Aqua says it has re-worked the card and made refunds so no further amounts are due. I don't know for sure if this refund is equal to or more than what I have directed it to do below. If Mr D accepts my decision I ask that Aqua double check my direction and ensure it has paid him at least what I have directed it to in connection with this complaint. If that is the case then it will not be liable to pay him more.

Neither party has given me cause to change my provisional findings. So my final decision is based on said provisional findings (as copied above) which I still consider fair and reasonable.

Putting things right

Aqua needs to put things right in accordance with my direction below.

My final decision

I uphold this complaint and direct NewDay Ltd trading as Aqua to pay Mr D on the following basis (as set out below) only in the unlikely event its calculation results in a figure greater than the total amount it has already paid Mr D in connection with this complaint (which I understand is £414.34+£272.42+£39.71):

- rework the card as if it had refunded the £414.34 on 15 May 2022 refunding associated interest and charges; and
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In any event I direct Aqua to provide Mr D with, if appropriate, a certificate of tax deduction for any 8% interest payment it has made to him in respect of the settlement of this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr D to accept or reject my decision before 11 June 2024.

Mark Lancod
Ombudsman