

complaint

Mr G complains Capital One (Europe) plc unfairly placed a Credit Industry Fraud Avoidance System (CIFAS) marker against his name. He says this has stopped him from getting a mortgage. He wants Capital One to remove the marker and compensate him for the distress and inconvenience the marker caused.

background

The background to this complaint, and my initial conclusions, were set out in my provisional decision dated 13 August 2019 – a copy of which is attached and forms part of this final decision

In my provisional decision I explained why I didn't think Capital One had enough evidence to satisfy the criteria set out in the CIFAS guidelines to apply a marker against Mr G's name in 2013. I said Capital One hadn't carried out sufficient checks to satisfy the burden of proof required to apply the marker. So it had treated Mr G unfairly when it applied the marker.

In my provisional decision, I considered the impact the CIFAS marker had on Mr G. And based on the evidence, I wasn't satisfied that Mr G hadn't been able to obtain a mortgage because of the CIFAS marker. And he hadn't suffered any financial loss. However, I was satisfied that once Mr G been made aware of the marker's existence, which was in February 2019, he'd spent time making phone calls and sending emails to Capital One in an effort to try and have the marker removed.

So I was satisfied that this issue had caused Mr G some trouble and upset. And I considered that the circumstances were such that Mr G was entitled to some compensation for what took place – once he was aware of the marker. I said Capital One should pay Mr G £100 compensation for the trouble and upset caused to him.

Capital One responded setting out that it accepted my provisional decision. Mr G didn't respond.

my findings

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

As Mr G and Capital One haven't made any more comments, or offered any more evidence, my findings about this complaint haven't changed.

I can see that this issue has had an impact on Mr G and caused him trouble and upset. I say this because Mr G had to make several phone calls and write emails to Capital One to try and have the CIFAS marker removed. In this case I don't think Capital One did enough to listen to what Mr G was telling them or let Mr G know what evidence he could provide about the activity on his account that led to the CIFAS marker being applied.

Overall, I consider that the circumstances here are such that Mr G is entitled to some compensation for the trouble and upset he's been caused. So I think Capital One should pay Mr G £100 compensation for what took place. I think that amount fairly reflects the level of distress and inconvenience caused to him.

my final decision

For the reasons I've explained, I uphold this complaint. And direct Capital One (Europe) plc to pay Mr G £100 compensation for the trouble and upset caused by Capital one unfairly placing a CIFAS marker against Mr G's name.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 29 September 2019.

Sharon Kerrison
ombudsman

COPY OF PROVISIONAL DECISION

complaint

Mr G complains Capital One (Europe) plc unfairly placed a Credit Industry Fraud Avoidance System (CIFAS) marker against his name. He says this has stopped him from getting a mortgage. He wants Capital One to remove the marker and compensate him for the distress and inconvenience this caused.

background

In 2012, Mr G opened a credit card account with Capital One.

In 2013, three cheques were paid into Mr G's account:

- 23 January 2013 cheque payment for £200.00
- 6 February 2013 cheque payment for £580.00
- 20 March 2013 cheque payment for £600.00

The cheques which were paid into Mr G's account didn't clear – in other words they 'bounced.' Capital One reviewed Mr G's account activity and said Mr G had issued payments to his account knowing the cheques wouldn't clear, and spent against the payments prior to the cheques being returned as unpaid.

Based on Mr G's account activity Capital One thought Mr G had misused his account. So they applied a CIFAS marker. Capital One didn't ask Mr G any questions about the payments into his account before making the decision to apply the CIFAS marker.

Mr G says it was only in January 2019 when he tried to buy a property and apply for a mortgage that he discovered Capital One had placed a CIFAS marker against his name in 2013. He said he didn't know anything about the cheque payments into his account. And believes someone else may have paid them into his account. Mr G complained to Capital One. And he asked Capital One to remove the CIFAS marker.

Mr G says his mortgage was declined because of the marker. And he wants Capital One to pay compensation for the legal costs he incurred for his failed house purchase. Mr G says he's also incurred further financial losses and stress when several business deals were cancelled as a result of the fraud marker. He wants Capital One to pay him £21,000 compensation.

Capital One said it hadn't done anything wrong when it applied the CIFAS marker against Mr G's name. And it's pointed out that the marker against Mr G's name expired in June 2019. Unhappy with this response Mr G brought his complaint to our service.

Our investigator reviewed Mr G's case and asked Mr G and Capital One some additional questions about the payments. Mr G said he wasn't in the UK between January and June 2013. And he was overseas caring for a sick relative. Mr G said he wasn't responsible for paying in the three cheques. He told us that whilst abroad he used different bank accounts. And not his Capital One credit card. The investigator looked at Mr G's credit card statements and noted that it was being used in the UK during the time Mr G said he was abroad. She also noted that Mr G hadn't disputed these transactions. And that his account was in arrears and had been defaulted in June 2013.

Capital One said Mr G's credit card was used against the cheque payments prior to them being returned. And thinks Mr G was paying in cheques he knew would be returned unpaid by the payee's bank. So it said the CIFAS marker had been correctly applied.

An investigator looked into Mr G's complaint. She thought Capital One was unfair when it applied the CIFAS marker. She asked Capital One to provide evidence it had carried out an investigation at the time to make sure the marker was applied correctly. And evidence to show that Mr G was responsible for paying in the cheques. But due to the passage of time Capital One said it was unable to provide anything. So the investigator said Capital One shouldn't have recorded a CIFAS marker against Mr G's name.

The investigator looked at the impact the marker had on Mr G. She noted that he hadn't been aware of the marker until January 2019 and asked him to provide evidence of how the marker had impacted him given he'd only recently discovered the existence of the marker. Despite repeated requests to do so Mr G hasn't provided any evidence of how the marker caused him financial loss, distress or inconvenience.

Capital One disagreed with the investigator's view. It said it hadn't done anything wrong when it applied the CIFAS marker. Mr G also disagreed. He said Capital One had discriminated against him and applied a defamatory fraud alert against his name. And he wants compensation for the impact the marker had on him.

As no agreement could be reached the complaint has come to me to decide.

my provisional findings

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 come to the same conclusions as the investigator. I'll explain why.

CIFAS marker

Capital One says it applied the CIFAS marker because it believes Mr G deliberately paid cheques into his account knowing they wouldn't clear. And he spent against the payments before the cheques were returned as unpaid. So I've looked at whether Capital One was fair to apply the marker, based on the evidence it had, the investigation it carried out. And what the rules say about applying such markers.

CIFAS guidance says the business must have carried out checks of sufficient depth to meet the burden of proof set by CIFAS, which at that time was that Capital One needed to have enough information to make a formal complaint to the police or other relevant law enforcement agencies. And that any filing should be for confirmed cases of fraud, rather than mere suspicion. In addition, CIFAS guidance sets out businesses are expected to retain the evidence they rely upon when applying a CIFAS marker for at *least* six years.

Having looked at what's happened here, I haven't seen any evidence that Capital One contacted Mr G *at the time* and asked him for information about the three payments made to his account. And it hasn't shown that it made any enquires regarding the unpaid cheques. So in this particular case, I don't think Capital One carried out sufficient checks to satisfy the burden of proof required to apply the marker.

I think Capital One should've contacted Mr G at the time as this would've given him the opportunity to explain the circumstances surrounding the payments into his account. Had it done so, Mr G would've been able to explain more about the activity on his account. And what he knew about the payments. Capital One would've also had the opportunity to make enquiries with other banks, if necessary, regarding the cheques which were paid into Mr G's account. And explore the possibility that someone else paid the cheques into Mr G's account as Mr G has suggested.

When I weigh everything up, I don't think Capital One had enough evidence to satisfy the criteria set out in the CIFAS guidelines. Capital One has also confirmed that due to the passage of time it no longer has any details (including copies) of the cheques which were paid into Mr G's account. So I

agree with the investigator that it was unfair for Capital One to put the marker against Mr G in these particular circumstances.

Where something has gone wrong we look to see if a consumer has lost out. And to put the consumer back in the position they would have been in had everything gone as it should have. So I've looked to see if there has been any financial loss for Mr G because Capital One applied a CIFAS marker.

Mr G has told the investigator that as a result of the CIFAS marker being applied his mortgage application in early 2019 was declined. And he's provided us with an invoice for solicitor costs. But Mr G hasn't provided any evidence to show that his application was declined because of the marker.

I've also kept in mind that Mr G had defaults on his credit file, which would've become known to lenders during credit searches, as part of any mortgage application process. So even if Mr G's credit file didn't have a CIFAS marker at the time of his application I think it's likely his mortgage application wouldn't have been approved. So I can't reasonably say that Capital One applying a CIFAS marker against Mr G's name caused Mr G's mortgage application to be declined. And I can't make an award for the solicitor costs which Mr G claims.

Mr G says he's suffered a great deal of distress and financial loss because of the marker being applied. He says he has lost several business deals over the years after checks revealed fraud alerts against his name. However, Mr G hasn't been able to provide any evidence to support this. I've also kept in mind that Mr G wasn't aware of the marker *until* January 2019, yet Mr G says over the last six years he's suffered tremendous financial loss and inconvenience as a direct result of the marker. So I'm unsure how Mr G can attribute what happened to the existence of the marker when he wasn't aware of it until very recently.

Having said that I can see that once Mr G was aware of the marker he spent time making several phone calls and sending emails to Capital One in an effort to try and have the marker removed. And explain what had happened. So I can see that this issue has caused Mr G some trouble and upset. And I consider that the circumstances here are such that Mr G is entitled to some compensation for what took place – once he was aware of the marker. I think Capital One should pay Mr G £100 compensation for the trouble and upset caused to him.

discrimination

Mr G suspects the bank is discriminating against him on the grounds of his nationality. And he's referred me to the Race Discrimination Act 2000. Whilst I recognise the strength of his feeling, I've not seen any evidence to show any discrimination on the part of Capital One.

my provisional decision

For the reasons I've explained, I intend to uphold this complaint. And direct Capital One (Europe) plc to pay Mr G £100 compensation.

I now invite Mr G and Capital One (Europe) plc to give me any further information they'd like me to consider before I make my final decision.

Sharon Kerrison
ombudsman