

complaint

Ms S complains that NewDay Ltd won't refund her money that was taken out as cash advances (which I'll refer to as withdrawals for ease). She's later complained about spending using her NewDay card as well. Ms S says that she didn't draw any money out or use the card to buy things. All of this happened in 2017. And she's struggled to pay the interest and charges that NewDay has applied to her account because of this.

summary

Having issued a provisional decision on this complaint, we got further information – first from Ms S, then NewDay.

In light of this new information I'm now telling NewDay:

- It doesn't have to refund any of the money Ms S says she didn't withdraw or spend using her credit card;
- To pay Ms S £200 for the poor service she's received;
- To remove the default from Ms S' credit record; and
- To actively engage with Ms S to agree a mutually acceptable repayment plan for the money she owes – and, for the avoidance of doubt, this also requires Ms S to actively engage with New Day.

background

how we've got to where we are now

When this complaint first came to us (and NewDay), Ms S just said she hadn't made any withdrawals using her card. Our investigator thought NewDay should refund the money. NewDay didn't agree – so it asked for an ombudsman to review the complaint.

I did this and issued a provisional decision in December 2019. I didn't agree with our investigator. I didn't think NewDay had to refund Ms S. I thought it strange Ms S had used the card for genuine spending between the ATM withdrawals she was complaining about. But I did think it hadn't given Ms S very good service. So I said I was minded to tell NewDay to remove the default it had recorded on Ms S' credit file and to pay her £200 for the poor service.

Ms S didn't agree with my provisional decision. In her reply she said that she hadn't used her card to buy things between the withdrawals. So I asked NewDay to investigate this before coming to a final decision on both matters.

NewDay looked into things but – like the withdrawals – it thought Ms S was responsible for the spending. We've asked Ms S if she has anything further to add to what NewDay has said. But she's said she can't think of anything more.

So, I've now got to the stage where I can issue a decision on both the withdrawals and the spending carried out using Ms S' NewDay card.

what happened

I'll keep this section as short as I can. A lot of detail about the withdrawals was set out in my provisional decision. I won't repeat all that here – as both Ms S and NewDay have had that decision. A brief summary is:

- Ms S contacted NewDay at the end of August when she saw £150 had been withdrawn (from ATMs over three occasions) using her credit card;
- She says she didn't withdraw the money and asked NewDay to help her;
- There was some confusion over what Ms S was asking NewDay to do – it thought Ms S was saying there was a problem with the transactions and wanted it to try and get the money back (presumably from a retailer);
- NewDay sent Ms S a form to fill in – so it could investigate things for her;
- Ms S says she sent the completed form back – but NewDay didn't get it (we've seen a certificate of posting which appears to cover the form);
- After some time, Ms S chased the matter up and NewDay sent Ms S a second form to fill in;
- Ms S sent the second completed form back early in 2018 – but, again, NewDay didn't get it (again, we've seen a certificate of posting which appears to cover the form);
- When Ms S chased NewDay again, it said it hadn't received either form and it was now too late for it to help her (due to the time limits that apply to trying to get refunds);
- By now, Ms S was struggling to make payments on her account – and because she thought NewDay should do more to help her – she stopped making payments; and
- In May 2018 NewDay defaulted Ms S' account.

Ms S wasn't happy with NewDay's response. So she contacted us and one of our investigators looked into things for her.

It's fair to say our investigator had great difficulty in getting as much information out of NewDay as we'd like. Based on what was available, he concluded NewDay should:

- refund the withdrawals (although it wasn't entirely clear whether two or three withdrawals were being disputed);
- rework Ms S' account and remove any interest and charges in respect of the withdrawals; and
- pay Ms S £100 for the distress and inconvenience she'd suffered.

In coming to this conclusion, the investigator referred to the requirements of the Payment Service Regulations 2009 (the PSRs) and the Consumer Credit Act 1974 (the CCA). These cover when a financial business can hold a customer responsible for transactions like these.

The investigator said the CCA was particularly relevant as it meant NewDay couldn't hold Ms S responsible for the withdrawals on the grounds that she'd been grossly negligent in not keeping her credit card (and PIN) safe. When a credit card is used it is counted as being a 'credit token' for the purposes of the CCA. And that restricts the liability NewDay can impose on Ms S.

NewDay didn't agree with the investigator's conclusions. It said Ms S hadn't sent the form(s) back in time and its records showed Ms S' credit card was being used between the disputed withdrawals.

The investigator didn't respond to NewDay's points but – as it hadn't agreed with his conclusions – said the complaint should be referred to an ombudsman to review and issue a final decision on.

my provisional findings and provisional decision

Again, I'll keep this section as short as I can.

I wasn't satisfied we'd investigated the points made by NewDay – in particular the fact that Ms S appeared to have been using her credit card for genuine spending between the times she said it was used fraudulently to make the ATM withdrawals. Nor had we considered what – if any – action might be needed now that Ms S' account had been defaulted.

I could see Ms S felt quite strongly about what'd happened here. That was clear from what she had said to us and to NewDay. And that's not surprising. £150 was taken out as cash – and Ms S was being charged interest on that money. She was struggling to keep up payments on her account. As she wasn't able to do this her account was defaulted by NewDay. That will have an impact on her for some time. So Ms S was bound to be concerned.

But – despite how difficult NewDay may have been in the earlier stages of this complaint – it did make some valid points. And those needed to be addressed. After considering what NewDay has said, and reviewing the evidence that is available, I didn't think it had to refund the £150. It followed that NewDay didn't have to rework Ms S' account. Nor did it have to pay her anything for the distress and inconvenience she's suffered directly relating to the withdrawals themselves.

But I felt NewDay had provided Ms S with a very poor level of service when she contacted it about the withdrawals. NewDay is the expert here – not Ms S. So I'd expect it to work through what Ms S was actually complaining about – and deal with the issue properly.

NewDay didn't do this. So I proposing to award £200 to compensate Ms S for that poor service and the costs she incurred in sending unnecessary forms to NewDay. And because I considered the poor service may have been a significant factor in the problems Ms S had in making her payments, I proposed that NewDay remove the default from her credit record and try to agree a payment plan so Ms S can repay the debt she has with NewDay over a sensible period of time.

how we go about investigating complaints – and the PSRs and CCA

When we look into complaints we must have regard, amongst other things, to the relevant law and regulations. And in this case, the PSRs and the CCA are the relevant regulations and law respectively.

What the investigator said about the requirements of the PSRs and the CCA are all technically correct. But the starting point of any investigation is to consider all the circumstances of the complaint. And then – if we consider the circumstances described to us (in this case by Ms S and NewDay) are plausible – apply the relevant law and regulations.

In other words, is what we're being told likely to have happened? And that's where I didn't agree with the investigator.

use of Ms S' credit card

Ms S said she didn't draw the three lots of cash out (but I accepted there was some confusion here and she may have initially only told NewDay about two lots). I looked at NewDay's records on these withdrawals. These show they were made using Ms S' genuine card and her PIN was entered correctly (at the first attempt). So the transactions were authenticated (as required by the PSRs).

But those records also showed that just before the withdrawals on 4 and 18 August, Ms S' card had been used to buy things in retailers not far from where the cash was withdrawn. And it was used several times between these dates. Ms S hadn't said anything about any of this spending not being genuine.

So, somebody would have had to take Ms S' card and get it back to her – on more than one occasion – without her noticing. And she hadn't been able to think of any way that could have happened. Ms S said she doesn't think anybody close to her would have done this. And she told our investigator she always keeps her handbag with her.

Ms S also told our investigator she kept a note of her PIN number in her wallet (with her card) with an "N" next to it. She said she keeps a note of all her PINs this way. That's always going to leave Ms S open to her card(s) being misused. While it may not quite be considered to be grossly negligent (as required by the PSRs and other guidance), it's not something I could ignore.

The amounts of the three withdrawals also struck me as odd. I'd expect a fraudster to try and maximise the amount they could get by using the card. Because NewDay hadn't provided as much information as I'd hoped, I didn't know what the daily limit for cash withdrawals on Ms S' account was. But it seemed at least £100 is possible. That's the amount taken out one time. So it seemed strange the later disputed withdrawals were for much smaller amounts.

When I combined the lack of an explanation for the use of the card around the time of the disputed withdrawals and the lack of security Ms S gave to her PIN, I didn't think it'd be fair to tell NewDay to refund the £150.

actions by NewDay – and time limits for making claims under the CCA

Much was made by NewDay of the time limits that would apply for Ms S to make a claim under either section 75 of the CCA or the chargeback scheme. As our investigator said, these aren't relevant – as there isn't a dispute over goods not being provided or not being as described. I had no idea why NewDay would think they are relevant.

But this confusion did indicate to me that NewDay didn't do as much as it should have done to help Ms S when she got in touch. Not all customers are familiar with details of the various laws, regulations and rules that impact on how they use their accounts. It's reasonable to expect a financial business to be the expert and guide their customers through these things.

Here, NewDay clearly failed in that regard. It sent forms for Ms S to complete that were unnecessary. I thought any fairly basic level of enquiry by NewDay at the time Ms S contacted it would have revealed what she was actually concerned about. That poor service compounded an already difficult situation for Ms S. So I thought NewDay should pay Ms S £200 to make up for that.

It was also a concern that NewDay says it didn't receive either of the forms Ms S sent in. We'd seen copies of two certificates of posting for when Ms S says she sent the forms back. The dates on those looked to be around the time we'd expect. Our role isn't to tell any financial business how to operate. That's the role of the regulator. But I hoped this was an area NewDay would consider outside this complaint.

default and arrangement to repay debt

Our investigator hadn't covered this in his consideration of Ms S' complaint.

Neither NewDay nor this service would suggest to a customer that they should stop making payments on a loan or credit facility because of problems over disputed transactions. So – in many respects – Ms S would normally have to live with the consequences of doing so, including having a default noted on her credit record for six years.

But here – I had to take into account the poor service NewDay provided her with. It should have established much earlier with Ms S what the actual problem was. Had NewDay not wasted time sending unnecessary forms, I consider it quite likely Ms S would have accepted the position over the withdrawals and discussed how to repay the amount owing on her credit card account much sooner.

Given what she'd said about the difficulties she was having it seems likely that any such arrangement would have been over quite a long period of time – perhaps 12 months or so. And any such arrangement agreed with NewDay may have been noted on her credit record. So there may still have been some negative impact on Ms S' credit rating.

My view was that NewDay should contact the relevant credit reference agencies (CRAs) and remove the default from Mrs S' credit record. Ms S should then actively engage with NewDay to agree a plan to repay the money she owes. NewDay may report this arrangement to the CRAs as it would accurately reflect the operation of Ms S' account.

If Ms S failed to engage with NewDay – or later broke any agreed plan for repaying the money she owes, NewDay would be free to record that with the CRAs. This may result in her account being defaulted (again) and that being on her credit record for a longer time than the original one (as the six years for that started in May 2018 and should only run up to May 2024).

summary

I couldn't be sure who made the three withdrawals using Ms S' credit card. Ms S was clear it wasn't her. But the use of her card then pointed to it being somebody very close to Ms S – particularly as they used it just after Ms S had and were able to get it back to her without her realising – on more than one occasion. I realised that's a difficult message to give – but it was where the available evidence led me.

Because of the unexplained use of Ms S' card and the way in which she left herself open to it being misused, I didn't think it'd be fair to tell NewDay to refund her the £150 that was withdrawn in cash.

But NewDay had provided Ms S with poor service – so I said it should pay her £200 compensation to make up for this (to include her costs in sending in the unnecessary forms). Much of what has followed since Ms S first got in touch with NewDay at the end of August 2017 is a result of that poor service.

Last, I thought it quite possible the default noted on Ms S' credit record may not have been applied in May 2018 had NewDay acted properly, as set out above. So I thought it should be removed. But Ms S still owes NewDay money – so it should be repaid, in a timely manner agreed by both parties. This may have further implications for Ms S' credit record.

responses to my provisional decision

NewDay didn't respond directly to the provisional decision. Given the way it had earlier engaged with the complaint process and our service, this isn't entirely surprising.

Ms S did reply. She didn't agree. Again that's not surprising. But she did raise an important new point. She now said that she hadn't used her card for the spending between the cash withdrawals that she'd contacted NewDay about in 2017.

I couldn't understand why Ms S had not raised this spending before. There was no mention of it when she contacted NewDay. And the spending would have been obvious from her account information. But it was only right that I ask NewDay to look into that spending as well.

NewDay took some time to respond to Mrs S. But, in summary, it was satisfied she'd authorised the spending as well as the withdrawals – and for largely the same reasons; the genuine card had been used and the PIN entered correctly each time.

We asked whether Ms S had anything further to add to her complaint as a result of what NewDay had said in its second (further) final response. She said she didn't.

my further findings

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

I've thought carefully about what Ms S has said about the use of her card. And I'm still not persuaded by what she says. The pattern of the use of the card simply doesn't fit that of a fraudster.

If Ms S didn't carry out any of the use of her card, I'd have expected her to raise this with NewDay back in 2017. She only said the cash withdrawals (at ATMs) weren't done by her. If she hadn't used her card at any of the retailers, then I'd have expected her to say something about this at the time. And – in particular – she didn't mention in either of the forms that she sent back to NewDay.

I still don't think it's likely that somebody unknown to Ms S would have used the card. They'd have to get the card out of her handbag and then replace it after using it several times over a

few weeks without Ms S realising. She hasn't said anything about the card going missing. And Ms S hasn't said anything about any of her other cards being taken or used fraudulently.

I can't rule out the possibility that Ms S spent and withdrew the money herself. She may simply have forgotten she used her NewDay card for these transactions.

As I said in my provisional decision, keeping a record of her PIN (and those for all her accounts) with her card does leave Ms S open to her account being abused. But the fact that she's indicated she has more than one card in her handbag does suggest that she might simply have got mixed up and used the NewDay card when she thought she was using another account – particularly as there has been no mention of other cards being taken and used without her knowing.

So, on balance, I don't think it'd be fair for me to tell NewDay to refund any of the spending or withdrawals Ms S says she didn't make on her account.

But that doesn't mean I think NewDay has done a good job here. It hasn't. I still think NewDay could have helped Ms S much more than it did – and much earlier. So the proposed actions I set out in my provisional decision stand.

I realise Ms S may be disappointed by my final decision. She may want to take the matter further through other routes. But it brings to an end what we can do for her in trying to resolve her dispute with NewDay informally. I'm sorry we can't help Ms S any further.

my final decision

For the reasons I've set out above, my final decision is that NewDay Ltd should:

- Pay Ms S £200 for the poor service she's received;
- Remove the default from Ms S' credit record; and
- Actively engage with Ms S to agree a mutually acceptable repayment plan for the money she owes – and, for the avoidance of doubt, this also requires Ms S to actively engage with New Day.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms S to accept or reject my decision before 21 January 2021.

Andrew Davies
ombudsman