

complaint

Mrs K complains that NewDay Ltd changed her address without her knowledge or consent and then sent a replacement card and personal identification number (PIN) to that address. This allowed her account to be used for transactions, which she says she didn't make or authorise.

background

Mrs K has had an Opus credit card with NewDay since around 2008. She says that in May 2017 NewDay allowed a third party to change her address without carrying out proper security checks. A couple of days later it sent out a new card and PIN to the new address. The card was then used for a number of transactions, all on the same day, totalling almost £700, which Mrs K says she didn't make or authorise.

NewDay has investigated and decided to hold Mrs K liable for the disputed transactions. It has closed the account and retained the credit balance of almost £400.

Our adjudicator thought this complaint should be upheld because she wasn't satisfied that Mrs K, or someone acting on her instructions, authorised the transactions.

NewDay didn't agree. In summary, it said that it didn't think Mrs K had been truthful in her dealings with it.

my 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, my review of the evidence has led me to the same overall conclusions as the adjudicator previously set out and for much the same reasons.

relevant considerations

The disputed transactions were made in May 2017. The regulations relevant to these are the Payment Service Regulations 2009 (PSR). In short, the regulations say that NewDay can hold Mrs K liable for the disputed transactions if the evidence suggests that she most likely made or authorised them herself. Mrs K says she didn't make any of the transactions on 12 May totalling £697.18 and is seeking a refund of that amount. So my primary concern is to come to a view about whether or not I think Mrs K authorised them.

Where credit is involved in cases like this the PSRs make provision for the Consumer Credit Act (CCA) 1974 to apply in place of certain sections of the PSRs. These provisions can't be excluded by the account terms.

Where a credit facility has been used the relevant legislation is Section 83 of the CCA 1974. The CCA says that a consumer isn't liable for any loss arising from the use of a credit facility unless they (or someone acting as their agent) used it.

Here, both of the transactions were made using a credit facility so the PSRs allow the bank to hold the consumer liable for up to £50 of the disputed transactions. But this will only apply if it's provided for in the account terms.

I need to come to a view about whether or I not I think Mrs K authorised the payments and, if she didn't, whether the relevant sections of the CCA 1974 have been considered and correctly applied.

were the transactions authorised?

Generally, unless a payment transaction is authorised then a bank has no authority to debit the customer's account. For me to be satisfied that these payments were *authorised*, I first need to determine whether they were *authenticated*.

I'm satisfied from the evidence NewDay has provided that whoever made the transactions had both the genuine card and PIN. I say this because there's evidence to show that the transactions were made and authenticated at Point of Sale (POS) machines - where the genuine chip in the card was read and the correct PIN was entered.

did Mrs K consent to the withdrawals?

I've gone on to consider the possible explanations for how the disputed transactions were made using the genuine card and PIN. These are:

- Mrs K received the card and PIN and used them herself
- Someone with Mrs K's authority used the card and PIN
- Someone was able to intercept Mrs K's card and PIN and used them to make the payments, without her authority or consent.

As I can't know for sure what happened in this case, I must make my decision based on the balance of the evidence.

Mrs K says that someone, unknown to her, phoned NewDay at the end of April 2017 to change her address. She says that NewDay didn't carry out proper security checks before changing the address and didn't verify the change with her either. A few days later, she says the same person called NewDay to ask it to send out a new card and PIN to the new address. She explains that because NewDay did this, the unknown third party was able to use the card for a number of transactions.

NewDay has provided a number of telephone recordings. Having listened to these, I find that there are several different voices featured. Mrs K has explained that her daughter often acts on her behalf. This service appointed a solicitor to make recordings of Mrs K and her daughter so that we could correctly identify them in NewDay's recordings. NewDay hasn't been able to provide a copy of the call made on 27 April 2017, in which the caller asked for the address to be changed. But I don't consider the next four calls after that were made by Mrs K or her daughter. I say this for a number of reasons:

- The voice of the caller isn't the same as those identified as Mrs K and her daughter in the recordings the solicitor made for us
- When either Mrs K or her daughter called they are able to provide both the card number and the mobile phone number
- In the first call on 29 April the caller didn't have the card available and wasn't able to provide the mobile number, without first looking it up
- In one of the calls the unknown caller mixed the postcode between the two addresses
- The unknown caller gave wrong information when asked additional security questions.

Given that I'm satisfied that the person who ordered the card wasn't Mrs K, and wasn't acting on her behalf, and that the caller confirmed the change of address, I consider it more likely than not that the card and PIN were intercepted and used without Mrs K's authority or consent. In addition, Mrs K actually tried to use the card she had in her possession a week or so later to withdraw £10 and it was rejected. If she had ordered the new card then I think she would have known that the original card had been cancelled.

I also agree that when the third party caller failed to answer the additional security questions correctly, NewDay should have blocked the card until it had fully identified Mrs K. If it had done so at that point, then the disputed transactions couldn't have taken place.

I appreciate that during the call Mrs K's daughter made to NewDay about the declined £10 cash withdrawal she gave some wrong information about transactions Mrs K made. And that this led to some confusion, which made NewDay decide to hold Mrs K liable for all the transactions. But Mrs K has been clear to this service that she didn't make them.

On balance, and after considering all the evidence, I'm not persuaded that Mrs K made or authorised the transactions or that she consented to anyone else having use of her card. As the withdrawals were made using a credit facility, I think NewDay should refund the transactions to Mrs K as she can't be held liable for them. I note that the terms of Mrs K's account don't allow it to hold her liable for the first £50 under section 84(1) of the CCA 1974.

closing the account

The terms and conditions of Mrs K's account do allow NewDay to end the agreement and close the account by giving two months' notice, if it believed she had told it something misleading or false. As Mrs K's daughter did provide some incorrect information, I don't think NewDay's made a mistake here. But Mrs K's account was in credit at the time and I think it's fair that NewDay return that credit balance to her.

my final decision

My final decision is that I uphold this complaint. To resolve matters, I require NewDay Ltd to:

1. Refund the disputed transactions totalling £697.18
2. Refund the account closing balance of £393.49 to Mrs K.
3. Remove any adverse information it might have reported to either the fraud prevention or credit reference agencies.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs K to accept or reject my decision before 26 December 2019.

Karen Wharton
ombudsman