

## **complaint**

Mr G complains HSBC UK Bank Plc will not refund some disputed transactions.

## **background**

Mr G disputes some transactions made on his account between 15<sup>th</sup> January 2019 and 29<sup>th</sup> January 2019. The transactions totalled £82 and Mr G says were made by his son without his consent.

At the time, Mr G was living with his son. He says he had given his son his card on one occasion to order some take away food. He had ensured that his son deleted the card details straight after.

When he discovered the transactions on his account, he left his son's home and complained to HSBC.

HSBC did not uphold his complaint. It said that as Mr G's son had carried out the transactions, it was not fraud. It also referred this service to a complaint Mr G had made in 2016 where his son had used his card without his consent. HSBC said it had educated Mr G on keeping his details safe then – so he should have known better on this occasion. It said Mr G had been grossly negligent.

Our investigator thought HSBC had been unfair in its approach – he didn't think Mr G had been negligent and so should not be held liable for the transactions. Mr G agreed but HSBC did not. It asked for an ombudsman's decision.

## **my findings**

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

The rules of our service mean that I have to determine this complaint by reference to what I consider to be fair and reasonable in all the circumstances of the case. When considering what's fair and reasonable I am required to take into account; relevant law and regulations; regulators' rules, guidance and standards; codes of practice; and where appropriate what I consider to have been good industry practice at the relevant time.

Where there are gaps in the evidence, for whatever reason, I will decide what I think is most likely to have happened – having regard to all the circumstances.

### *relevant considerations*

HSBC, as an FCA regulated firm, provided a current 'deposit' account. As such the FCA's overarching Principles for Businesses apply including the requirement to pay due regard to a customer's interests and treat them fairly (Principle 6).

The transactions from Mr G's account were made in January 2019. So of particular relevance to my decision about what is fair and reasonable in the circumstances of this complaint are the Payment Services Regulations 2017 (PSR 2017).

### ***gross negligence***

Whether a customer has acted with “gross negligence” is something that can only be assessed on a case by case basis taking into account all the circumstances. The term is not defined in PSR 2017 nor in the first Payment Services Directive. However, recital 72 of the second Payment Services Directive provides as follows:

*“In order to assess possible negligence or gross negligence on the part of the payment service user, account should be taken of all of the circumstances. The evidence and degree of alleged negligence should generally be evaluated according to national law. However, while the concept of negligence implies a breach of a duty of care, gross negligence should mean more than mere negligence, involving conduct exhibiting a significant degree of carelessness; for example, keeping the credentials used to authorise a payment transaction beside the payment instrument in a format that is open and easily detectable by third parties...”*

Reflecting this, the FCA, in its document setting out its role under the Payment Services Regulations 2017, says:

*“... we interpret “gross negligence” to be a higher standard than the standard of negligence under common law. The customer needs to have shown a very significant degree of carelessness.”*

Both statements are of value as a relevant consideration in the absence of contemporaneous interpretative guidance, and because they inform the meaning of a concept that has been in place for some time (in the Banking Code).

When considering gross negligence in a commercial contract context, *Mance J in Red Sea Tankers Ltd v Papachristidis (The “Ardent”)* [1997] 2 Lloyd’s Rep 547, 586 said:

*“If the matter is viewed according to purely English principles of construction, ... “Gross” negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence... as a matter of ordinary language and general impression, the concept of gross negligence seems to me capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or indifference to an obvious risk.”*

Negligence is often referred to as a failure to exercise reasonable care, but as I have described above gross negligence suggests a lack of care that goes significantly beyond ordinary negligence. So I have to consider whether Mr G’s actions fell so far below the standard of a reasonable person that it would be fair to say he failed with gross negligence to keep his personalised security details safe or to comply with the terms and conditions of the account.

I don’t think giving his son the details of his card in order to use on one occasion – and then make sure that the details were deleted – can be considered to be grossly negligent. I’ve thought about whether the incident in 2016 makes a difference to my decision but I don’t think it does.

The disputed transactions were not transactions which Mr G had made in the past. Its accepted by all parties that his son used his card without his authority and I am satisfied that he also used it without his consent.

In all the circumstances, I think it is unfair and unreasonable for HSBC to hold him liable.

**my final decision**

My final decision is that I uphold this complaint.

HSBC Bank UK Plc should:

- refund the disputed transactions (minus the £35 if it chooses to do so)
- pay interest at the rate of 8% from the date of the transactions to the date of settlement.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 27 June 2020.

Shazia Ahmed  
**ombudsman**