

complaint

Mr C complains that his credit card provider, NewDay Ltd, won't refund transactions to a gaming app provider which he says he didn't make or authorise.

background

Mr C held a credit card account with NewDay. On 19 June 2017 his card was used to make a small payment to a gaming app provider. Between 9 and 30 July a further 12 transactions to the app provider debited the account. Mr C thinks he authorised these. The balance of the account (£99.18) was paid by direct debit on 4 September.

Between 9 October and 8 November 2017 the card was used to make 45 transactions to the app provider. These ranged in value from 89p to £48.99 with 29 transactions under £10. A statement dated 8 November 2017 gave an account balance of £500.77.

Between 10 November and 16 November 2017 a further 29 transactions debited the account in favour of the app provider totalling £296.81. These ranged in value from 89p to £39.99 with 24 transactions under £9.

On 18 November Mr C used the card in a department store.

Between 18 November and 8 December 2017 a further 108 transactions debited the account in favour of the app provider. These ranged in value from 89p to £92.99 with one transaction of £184.99. There were 48 transactions of £39.99 or more.

November's balance of £500.77 was paid by direct debit on 4 December 2017.

Later that month Mr C received a letter indicating he'd exceeded the £3,500 limit on his credit card. He's said it was only at that point he discovered his card details had been used to make in-app gaming purchases since October. He said none of these purchases were authorised by him.

After establishing that it was his young child who'd been making the purchases "accidentally", most of them were refunded by the app provider. But Mr C was left with about £590 worth of transactions which he asked NewDay to reimburse.

He wanted to know why the "uncharacteristic" spending hadn't prompted further checks by NewDay, and why they'd allowed his credit limit to be exceeded. He also said he'd had issues logging on to his online account and thought the account should have reverted to paper statements after a period of inactivity.

In January 2018 NewDay declined to refund the transactions. They said it was Mr C's responsibility to maintain the account balance within the agreed credit limit.

What Mr C told us

Mr C explained that if his children wanted to make in-app purchases they would give him the cash and he would input his credit card details. He said, "My process was always to enter card details online myself and at some point the card details must have saved on the system." He said if he'd known his card details had been saved to his child's account following a genuine purchase, he'd have deleted them.

He said that he didn't notice the disputed transactions before NewDay's letter because he'd been unable to access his account online to check statements. He'd not reported that difficulty to NewDay because he so rarely used the card, and thought he'd be contacted if there was any suspicious activity.

Mr C explained that he always paid the balance of this card in full each month to avoid interest costs. When asked why a payment towards the credit card taken by direct debit on 4 December 2017 (£500.77) didn't alert him to the fact that it was being used, he said he assumed he'd used the card for shopping or petrol purchases in the run up to Christmas.

What NewDay told us

NewDay said that the disputed spending didn't trigger any security response because Mr C's card had been used to make undisputed transactions to the same merchant in the recent past. They didn't agree to refund any of the transactions, but they said they could have handled his complaint better and offered £50 as a goodwill gesture.

Our investigator's view

Our investigator upheld the complaint. He wasn't persuaded that Mr C knew about or authorised the disputed transactions. So, he said that NewDay should refund the disputed amount with interest and increase their offer of £50 to £150 to reflect their poor investigation and complaint handling.

Mr C accepted this outcome. NewDay didn't; they said Mr C should remain liable for the spending because there was no evidence of fraud.

Relevant considerations

When considering what is fair and reasonable, I'm 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 credit is involved, as in this case, a consumer's liability for unauthorised payments is set out in section 83 of the Consumer Credit Act (CCA) 1974. Section 83 of the CCA 1974 says that a consumer isn't liable for "*any loss arising from use of the credit facility by another person not acting, or to be treated as acting, as the debtor's agent.*"

The terms and conditions of Mr C's credit card

The agreement for Mr C's credit card account included the following relevant terms:

"If you, or an additional cardholder, allow someone else to use a card or the card number, you will be liable for all transactions they make until you tell us that the card may be misused."

my provisional decision

As NewDay didn't accept the investigator's view, the complaint was passed to me to decide. I issued a provisional decision on 9 February 2021. I said:

"Taking into account the above relevant considerations, I think the key question here is whether Mr C, or someone that can be treated as acting as his agent, made the transactions to the app provider.

Authorisation isn't limited to transactions for which explicit permission has been given; NewDay would also be entitled to hold Mr C liable for any transactions which were done by someone to whom he gave authority to act on his behalf. In other words, if a payer has permitted the use of his payment instrument by a third party (an agent) so that it looks to the bank like the payment transaction has been authorised by the payer, the payment can be considered authorised.

That isn't to say that Mr C would be responsible for any transactions where the payment instruction received by the bank is indistinguishable from one he gave actual authority for. For example, a payment transaction carried out by someone who'd stolen Mr C's card details would still rightly be described as unauthorised, even though it might have the same appearance from the bank's perspective as a genuine transaction.

The important consideration here is what part Mr C played in permitting the transactions he disputes. So, I've thought about whether by his actions Mr C held his child out as having his authority to make payment transactions using his credit card.

Mr C has explained that he entered his card details on his son's gaming account. Although I understand that he didn't appreciate at the time those details would be saved as a payment method for future use, that's not something I can hold NewDay responsible for. I think that by entering his account details in this way Mr C made his child his agent and gave him the appearance of having his authority to make payment transactions. In these circumstances I think it's fair for NewDay to treat the payment transactions as authorised and to hold Mr C liable for them.

I appreciate the question Mr C has raised about why NewDay didn't spot and stop what he has described as "uncharacteristic" spending. I also recognise that there were a substantial number of transactions to the app provider over a period of two months (10 October to 8 December). But I'm conscious there was a history of genuine spending with the merchant which dated back beyond June 2017, and the transactions started off slowly and built up gradually. The majority were also low value and the later higher value transactions are ones which the app provider has already refunded. Also, although the transactions were regular, there were often gaps of a day or two between them until late November when they started to become a daily event.

So, while the usage and value did increase over time, and eventually Mr C's credit limit was reached, I don't think it would be fair to say NewDay should have stepped in.

Overall, I provisionally find that NewDay have acted fairly and reasonably by declining to refund the transactions which the app provider hasn't already refunded.

I note NewDay have said they could have handled his complaint better, and previously offered Mr C £50 as a goodwill gesture. I don't intend to ask NewDay to do any more than honour that gesture."

responses to my provisional findings

NewDay accepted my provisional findings. Mr C expressed his disappointment with the outcome but said he wanted “*closure*”. He’s unhappy that NewDay didn’t alert him to what was happening sooner, either by sending him paper statements or questioning the transactions.

Mr C added that the transactions could have been carried out by an unknown third party “*hacking*” his son’s gaming account, but he acknowledged he has no evidence to support that. He said, “*I maintain that at no point did I authorise any of the spend I disputed and my 10-year-old son did not have the authority to make the payments.*”

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, I do not uphold Mr C’s complaint.

I acknowledge Mr C’s disappointment with the outcome, and I accept it’s not likely he made the transactions he disputes or had knowledge of them. But, as I explained in my provisional decision, third parties can validly authorise payment transactions where the cardholder has given them the status of an “*agent*”. And by saving his card details to his son’s gaming account I remain of the view that Mr C gave the user of that gaming account his apparent authority to transact using his credit card.

As I’ve found that the transactions were, in effect, authorised by Mr C, I find it’s fair and reasonable for NewDay to hold him liable for them.

I’ve thought carefully about whether NewDay could have done more to prevent the disputed transactions, and whether there was any failing on their part which would mean Mr C should not be held liable for any portion of the spend. But for all the reasons set out in my provisional decision I still don’t think there’s enough to say NewDay should have done things differently.

Overall, I find that NewDay have acted fairly and reasonably by declining to refund the disputed transactions.

As noted in my provisional decision, NewDay have previously said their handling of this complaint could have been better and offered Mr C £50 as a goodwill gesture. Whilst I make no findings about NewDay’s handling of this complaint and I’m not making any award here, I’d expect NewDay to honour any offer they’ve already made. I therefore leave it to NewDay to make arrangements with Mr C regarding this payment if they haven’t already.

my final decision

My final decision is that I do not uphold Mr C’s complaint.

Under the rules of the Financial Ombudsman Service, I’m required to ask Mr C to accept or reject my decision before 1 April 2021.

Beth Wilcox

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