

Complaint

Mr P has complained that TSB Bank plc won't refund transactions, which he says he didn't make, and that it registered a fraud marker against him.

Background

Mr P is disputing six payments totalling £12,921.70 to a gentleman's club. The payments included three single transactions for £2,200, £3,300 and £3,300.

All the payments were made with Mr P's debit card and PIN.

Mr P said he didn't recognise the payments. He admitted visiting the club on a night out with his brother but said he was drunk and couldn't remember much. He remembers paying for a few rounds of drinks for no more than £20 at a time. And he paid for two dances, which he said were no more than £200 each. But he said he didn't authorise any payments over £200.

He said when he bought the drinks, he entered his card into the card terminal, confirmed the amount and then keyed in his PIN. But, when paying for the dances, he said a staff member took the card from him and entered it into the terminal before handing it back to him to key in his PIN. He said no more than £200 was displayed on the terminal.

He believes now that someone drugged him while he was in the club. He said the staff separated him from his brother and took him to a separate VIP room. His brother left the club when he couldn't find Mr P. He said he woke up the next morning in the club.

He still had his card on him when he reported the transactions to the bank. It wasn't lost or stolen. He confirmed that no one had access to his card and that he shielded his PIN when using the card terminal. But he also thinks someone could've taken his card from him, if he were drugged, and that he might've been shoulder surfed by the cashier, who had been standing next to him.

He asked TSB for a refund and sent it an article about another customer who had been drugged in the same club.

TSB decided not to refund him. It considers he authorised the transactions because:

- the payments were made with his card and PIN
- he was in the club and admits paying for drinks and two dances
- he said the card was in his wallet and no one else had access to his card or wallet
- his PIN wasn't stored anywhere.
- his primary concern was that he was charged more than he thought he'd paid, and he needed to take this up with the club owner.

TSB also contacted the club. The club owner confirmed that, for transactions over £500, they ask customers to provide photo ID and to sign a form giving consent to the transaction. The club owner provided TSB with:

- receipts for all the disputed transactions
- a copy of Mr P's driving licence
- 4 consent forms for the transactions over £500, signed by Mr P.

TSB closed his account and registered a CIFAS marker after declining his claim

Mr P was unhappy with TSB's decision and so he brought his complaint to this service. He told us he'd reported the incident to the police. The police confirmed that they had interviewed customers with similar complaints, but there was insufficient evidence for a prosecution.

An investigator looked into his complaint, but she decided not to uphold it. She felt unable to conclude that the payments were fraudulent, after having reviewed the evidence. She thought it was more likely that Mr P had authorised them.

Mr P disagreed with our investigator's view. He's asked for an ombudsman's final 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 investigator wrote a detailed view that sets out in full the facts, the transactions, the evidence and relevant regulations. Mr P and TSB have read the investigator's view, so I won't repeat every detail, only those which form the basis of my decision. However, I can assure both parties that I have read the file, including the evidence, which they have provided. Having done so, I'm afraid my review of the evidence has led me to the same overall conclusions as those reached by the investigator and for broadly the same reasons.

Generally, TSB can hold Mr P liable for the disputed payments if the evidence suggests that it's more likely than not that he made or authorised them himself.

I'm satisfied from the bank's technical evidence that Mr P's genuine card and PIN were used to make the disputed payments. But the regulations relevant to this case say that is not, on its own, enough to enable Halifax to hold him liable. So, I also need to think about whether the evidence suggests that it's more likely than not that Mr P consented to the withdrawals being made.

Based on what Mr P has told us, there are only two scenarios which explain what happened. He made the payments himself, but he didn't know what he was doing because he was drugged. Alternatively, a staff member shoulder-surfed him, stole his card while he was drugged and used it in the club before returning it to him at the end of the evening.

It's plausible that someone else could steal his card while he was drugged or very drunk but I'm afraid I don't think this is what happened because:

- his original complaint was that he'd been taken advantage of while drunk or drugged and overcharged by staff
- he said staff took his card from him while he was drunk or drugged before giving it back to him so that he could type in his PIN
- he admits buying a couple of dances but thought he was paying no more than £200 at a time
- he said he shielded his PIN when using the card terminal, which would've made it difficult, although not impossible, to shoulder-surf him

It is also unusual in fraud cases for a third party to return the card and not spend as much as possible in as short a time as possible. And in this case, the person would've also stolen his driving licence, as the merchant provided TSB with a copy of it. Again, this is unusual.

But I think the most compelling argument against third party theft, is Mr P's own admission that he paid for a couple of dances and believes he was overcharged while he was drunk or drugged.

I think this is a more plausible explanation. And to his credit, Mr P has been open and honest about his actions. He admits he was in the club. He admits he used his card to pay for drinks and two dances. He said he thought he spent no more than £200 on two dances.

I have also seen the police report and website articles about the club. I'm sure Mr P is being truthful when he says he was drunk and believes he was also drugged.

Based on the evidence, I think it's more likely than not that Mr P made the payments himself, but he was drunk and/or drugged at the time. I think he might've forgotten how many payments he'd made and thought he was paying less than he was charged.

The question which Mr P has asked is 'can he consent to a payment while drunk or drugged?'

I'm afraid the answer is 'yes.' Under the Payment Services Regulations 2009 'consent' has a specific meaning. A payment transaction is regarded as having been authorised by the payer only if the payer has given its consent to—

- the execution of the payment transaction.

The regulations go on to say that 'such consent must be given in the form, and in accordance with the procedure, agreed between the payer and its payment service provider.'

The form and procedure are usually set out in the terms and conditions. I have looked at the current terms and conditions for TSB and it says:

*Using a debit card;
– You'll need to enter your PIN or card details (including the long number on the front of the card) when making payments online. Doing so means that you've agreed to make the payment.*

In addition, the Financial Conduct Authority has stated that,

'The procedure for giving consent to execute a payment transaction could be in writing, by using a payment card and PIN.' (Payment Services and Electronic Money – Our Approach 2017)

In short, this means that when Mr P used his card and PIN, he consented to the payment instruction to the bank. I'm afraid it doesn't matter if he was drunk, drugged or didn't know the value of the transactions. He is still treated as having consented to them. And the use of his card and PIN are evidence at the very least of 'apparent authority' which is sufficient for these purposes.

For these reasons, I don't think it's unreasonable for TSB to conclude that Mr P authorised the transactions.

The copy of his driving licence and the signed forms also show it's more likely than not that he consented to the transactions. But I don't think they are, on their own, evidence of authorisation. Besides, I note there is only one signature, which looks like a possible match for the signature on our file. The other signatures don't match Mr P's signature.

If Mr P believes he was overcharged and or drugged by the staff, then he might want to consider court proceedings against the club owner. But his complaint against the club owner is not a matter that this service can consider.

CIFAS

TSB agreed to remove the CIFAS marker in July 2017, after admitting that Mr P didn't make a fraudulent claim and that it was wrong to register one. TSB offered him £300 for the distress and inconvenience caused by its decision.

However, the marker was still active by October 2019, when TSB eventually removed it.

Mr P now wants £1,000 for his distress and inconvenience. Understandably, he was deeply offended by the suggestion he was a fraudster. He also says the marker made it difficult for him to open a bank account. He's provided a letter from a high street bank, declining his application for an account. He managed to open an account with a new bank, but it closed his account very quickly. Although neither bank referred to the CIFAS marker, I am sure this was a decisive factor. His account with TSB had a healthy balance. I couldn't see anything which would raise alarms with another bank. I understand he found another bank, which he's been using since October 2019.

Mr P also said he couldn't easily register for utility bills which in turn meant he didn't have any reliable proof of address. And he was deterred from applying for credit, accommodation, mortgage. He added that the marker also affected his job in the jewellery sector as he was forced to carry around large amounts of cash on his person placing him at a greater personal risk of being robbed. However, he hasn't provided any evidence showing these additional difficulties.

In these circumstances, it seems the CIFAS marker added to the inconvenience of finding a bank account but had little other impact. I consider that £500 is a fair reflection of the inconvenience caused to Mr P.

I'm very sorry for what has happened to Mr P. This will be disappointing news for him, but I hope the reasons for my decision are clear.

my final decision

My final decision is I am not upholding Mr P's complaint about the disputed transactions.

I am upholding his complaint about the CIFAS marker and I am asking TSB to pay him £500 for his distress and inconvenience caused by the CIFAS marker.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 18 March 2020.

Razia Karim
ombudsman