

complaint

Mr W complains that NewDay Ltd hasn't reimbursed him for transactions he says are fraudulent.

background

Over the course of 2018 Mr W raised four fraud claims in relation to payments he didn't recognise on his Aqua credit card. NewDay replaced his credit card each time and reimbursed him for several payments in relation to his earlier claims.

This complaint is in relation to the claim he raised on 14 November 2018 for payments on the card active between 9 April 2018 and when he reported the fraud. NewDay declined this claim and withdrew Mr W's credit facility on 29 November 2018. It also reconsidered a previous claim because it believed the payments were authorised by Mr W.

Mr W says he kept his card in his wallet and would keep it on him when he worked. He says no-one had access to his card, PIN number, phone, or laptop.

Mr W hasn't specified which payments he's disputing, but he has confirmed that he isn't disputing payments to his mobile phone provider or payments local to his home address including cash withdrawals. This mainly leaves online payments; while there are some online retail purchases, the majority of the remaining payments that appear disputed are to adult websites. These are for relatively low values, typically under £100, but often multiple times a day. The total claim investigated by NewDay is around £3,000.

NewDay said one of the reasons it declined Mr W's claim was because the IP address for one of the disputed payments matched one that was genuine to a music store. Mr W has since said he didn't make either payment.

Mr W has said he doesn't use his card online and that he would provide evidence from his mobile internet provider showing he couldn't have accessed adult websites. He's also said that he would provide tachograph data from his lorry to show his whereabouts. Mr W thought his account with at least one retailer had likely been hacked.

It was left open that if Mr W provided further evidence to NewDay that support that he hadn't authorised the payments then it would consider whether this affected his claim. But after it declined his complaint it continued to pursue him for the debt.

When Mr W brought his complaint to our Service, the adjudicator didn't uphold the complaint. He noted that it wasn't clear exactly which transactions Mr W was disputing, but in summary he thought, on balance, it was more likely than not that Mr W had authorised the payments on his credit card.

Mr W disagreed with the outcome and let us know he's also unhappy that he's found out NewDay have registered a CIFAS marker against him. He said he's hired a solicitor in relation to a different business that something similar has happened with and they have new information about the addresses that certain goods were delivered to.

The complaint has been passed to me for a 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.

For clarity, I'm not making a finding here on how NewDay has acted in relation to debt collection since the account was closed, nor am I making a finding on whether it was appropriate for NewDay to record information with CIFAS or any other fraud prevention agency in relation to Mr W. This complaint concerns whether NewDay has acted fairly in holding Mr W responsible for transactions he's disputed.

The relevant law here is the Payment Services Regulations 2017, and broadly speaking Mr W is responsible for any payment that he has authorised, and he isn't responsible for unauthorised payments. So, the key question here is whether NewDay has acted fairly in concluding that Mr W did authorise the disputed payments. I think it has and I'll explain why.

For a payment to be authorised, NewDay must show that it was authenticated correctly and why it thinks Mr W consented to it. Here NewDay has provided audit information to show that for the online payments the card information including the secure CVV code was used. It has also shown that for the cash withdrawals Mr W's genuine card was used - as the chip was read and his PIN was correctly entered. This means the payments were correctly authenticated. The remainder of this decision focuses on the issue of whether Mr W consented to the payments.

Consent must be given in the form and procedure agreed between the parties, here this means the terms of the account. Mr W's Aqua credit card's terms and conditions say the following.

"12 Making payments

12.1 The authorisation of a transaction can include authorising any single transaction, a series of recurring transactions (including transactions for an indefinite period) or pre-authorising a future transaction of a certain or uncertain amount. A transaction will be regarded as authorised by you or an additional cardholder where you or an additional cardholder:

12.1.1 authorise the transaction at the point of sale by following whatever instructions are provided by the merchant to authorise the transaction..."

Mr W hasn't specified to us which transactions he disputes, but I'm satisfied Mr W has been given ample time to provide this information and any evidence that he may wish to. Where information or evidence is unavailable, I must determine what I think is more likely than not to have happened, based on the evidence available.

At this time Mr W hasn't provided the evidence he's referred to, in particular:

- evidence from his solicitor or retailers detailing delivery information
- evidence from his internet provider showing he couldn't access adult material / websites
- tachograph data from his previous employer to evidence his whereabouts
- evidence that any genuine retail accounts he had have been hacked / compromised

For clarity, Mr W doesn't need to have physically carried out a payment himself or been in receipt of any good purchased in order to have authorised them. Whilst this is of course

relevant to whether it's likely that he did consent to them. Payments would still be authorised if Mr W allowed someone else to make these payments or to act on his behalf. I'll set out my findings by payment type.

Card present

There was only one ATM withdrawal which wasn't local to Mr W's home – this was for £50. It isn't clear if Mr W disputes this payment, but the audit provided by NewDay shows his genuine card was used and his PIN was entered correctly. Mr W has also used his card for undisputed cash withdrawals. Given Mr W still has his card and hasn't provided any plausible explanation for how a third party obtained this or his PIN number, I think it's more likely than not that he did authorise this withdrawal.

Card not present

Turning to the online payments, there appear to be several online payments to well-known retailers from Mr W's card that he hasn't said he's disputing or raised with Aqua as part of his fraud claim so I won't comment on them individually. Mr W has been clear that he didn't make the two payments to music shops, payments to at least one retailer or to any adult websites and so I'll focus on these.

As these payments were online, Mr W wouldn't have needed to be physically present. Our adjudicator obtained some information from a third-party billing company for some of the adult websites and this didn't match Mr W's. This does support his position that he didn't make the payments, but this isn't enough in itself to show Mr W didn't consent to them. So, I've needed to weight this up against the other evidence available to decide what's more likely than not to have happened here.

To date, I haven't been provided with a plausible explanation for how an unauthorised third party could have obtained Mr W's card information. This includes his secure CVV number.

I've also reviewed Mr W's statements and can see that around £14,000 was paid into the account between August and November 2018 when many of the disputed payments were made. For example, there are credits of £1,000 each on 11th, 17th, 24th 27th, and 29th September 2018. Mr W hasn't commented on why he made these payments.

Bearing in mind the account had a credit limit of £1,400 and the timing of these payments, which appear to coincide with when funds were needed to make further purchases, I think this suggests Mr W was aware of the account activity and that he took steps to ensure further purchases would be possible.

Many of these payments were to the same providers as payments that were the subject of Mr W's previous fraud claims. I would have expected Mr W to be checking his statements regularly and reporting any further concerns promptly. I note Mr W switched to electronic statements in September 2018 and so would have been able to see these even if he'd been away from home working. And as above, his payments into the account suggest he was aware of the balance and activity. However, Mr W appears to be disputing payments that took place over months but didn't raise his fraud claim until November 2018.

Taking the above into account, I think NewDay has acted fairly in concluding that Mr W consented to the payments from his account.

my final decision

My final decision is that I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 9 September 2021.

Stephanie Mitchell
ombudsman