

complaint

Mr S has complained NewDay Limited, trading as Aqua, is asking him to pay for cash machine transactions he didn't make.

background

Mr S held an Aqua account with NewDay. In October 2016 he paid off his existing balance. Aqua sent him a new card in December 2016 but this wasn't activated. Mr S moved house in April 2017. Throughout 2017 Mr S logged online to his Aqua account seven times. Once in July 2017 just shortly after Mr S logged onto his account, Aqua received a notice that the direct debit previously set up on the account was cancelled.

Mr S's card was activated using Aqua's system in December 2017. Three cash withdrawals of £300, £300 and £100 were taken out in the next two days. Letters and statements were then sent to Mr S telling him he'd exceeded his credit limit. Mr S told Aqua he hadn't made the transactions. Aqua believed as these transactions were made using the genuine card and PIN, they could continue to hold Mr S liable.

Mr S brought his complaint to the ombudsman service. Our investigator reviewed the detailed evidence Aqua was able to provide along with Mr S's testimony. Overall he felt that Mr S had authorised these transactions.

Mr S disagreed with this outcome and asked an ombudsman to consider his complaint.

I completed a provisional decision on 29 October 2019. I believed there wasn't enough evidence to show Mr S had received the card and authorised the transactions.

Following that PD I received no comments from either party. I now have all I need to complete 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.

Having done so and received no further comments from either party, I'm coming to the same conclusion as my provisional decision. There's little need to amend what I previously wrote.

The Payment Services Regulations primarily require banks to refund customers if they didn't make or authorise payments themselves. Certain other circumstances do apply – but not specifically in this case where we're looking at a credit card. So when we look at whether a bank has acted fairly in rejecting someone's fraud complaint, one of the things we consider is whether the customer made the transactions themselves or allowed them to be made. If they did, then we generally wouldn't ask the bank to refund them.

Our investigator felt as he couldn't see who else had access to Mr S's PIN, then Mr S authorised the disputed transactions totalling £700. In fact it's not my role to decide who else could have made the transactions, rather if I'm to uphold this complaint I need to be satisfied Mr S didn't make or authorise the transactions himself.

Mr S's story is that he told Aqua he wanted to close the account in November 2016 just after he paid it off in full. I've reviewed Aqua's detailed notes and I can see no evidence they were told this. I've also seen Mr S logged onto his account every now and then throughout 2017 which would be odd if he had in fact closed the account. But it's certainly true he wasn't using the account and all the evidence points to him cancelling the direct debit in July 2017. So I don't think it would be wrong to say he regarded the account as dormant, if not specifically closed.

I can also see Aqua sent Mr S a replacement credit card in December 2016. This was sent to the address he was living at at the time. Mr S said he never received it. I think it's possible if he had received it – and wasn't planning on using it – he may have contacted Aqua then to cancel the agreement. That didn't happen. But there's also a possibility as Mr S thought he'd closed the account, he just didn't really take any action at all when he got the card. He may not even have opened the envelope. I don't see any obvious reason to doubt Mr S in his recollections here.

So Mr S may have had the card but wasn't aware of it. He then moved house in April 2017. The card needed activating before it could be used. This happened in December 2017. Aqua has said that it would be unusual for a fraudster to hang onto a card for a year and then activate it. But it's similarly unusual for a genuine cardholder to hang onto a card, find it, activate it, use it immediately for cash withdrawals – which weren't their usual pattern – and then deny they'd done it.

But we don't really know what happened to the card. It could have got lost and then only found in December 2017 when it was activated. Aqua hasn't been able to confirm exactly what personal information about Mr S was used to activate the card through Aqua's automated service. So overall I think it's just as easy for an unknown third party to have located Mr S's card and activated it, as Mr S.

The actual transactions themselves happened on 18, 19 and 20 December 2017. The same cash machine, located about four miles away from Mr S, was used for all three withdrawals. In the case of the two £300 cash withdrawals, both were preceded by the wrong PIN being entered and transactions being declined. This unfortunately doesn't provide me with convincing evidence one way or the other.

After not using the card for a year, it wouldn't be surprising if Mr S had forgotten his own PIN. But similarly if a third party was using his card without Mr S's knowledge and had taken a guess at the PIN, then it wouldn't be surprising they got it wrong first time.

However I would have thought that if these transactions had been done by Mr S, he'd have remembered the PIN the second time he used it to withdraw cash on 19 December. This wasn't the case.

Mr S felt Aqua must have sent a new PIN out at the same time the replacement card was sent. But after reviewing Aqua's evidence, there's absolutely nothing to show this was the case.

It's worth pointing out I don't need to know how someone else found out Mr S's PIN although this is a factor I've considered in coming to my conclusion. Actually there are a number of potential scenarios. His PIN on the Aqua card could have been the same as the one he used on other cards so this information may not have been too difficult to find out.

Taking everything into consideration and on balance, I've seen nothing that has convinced me that Mr S has made or authorised these transactions. This means that Aqua can't expect him to pay what they feel he owes them. Any action they've taken to default this account will also need to be reversed.

I'm sure this has all caused Mr S quite a deal of stress over the last two years that this has been going on. I'm sorry it's taken so long for us to be able to deal with his complaint.

my final decision

For the reasons I've given, my final decision is to instruct NewDay Limited, trading as Aqua, to:

- Stop pursuing Mr S for the payment of this credit card account;
- Close the account and remove any reference after October 2016 from Mr S's credit record.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 19 December 2019.

Sandra Quinn
ombudsman