

complaint

Miss C has complained that Santander UK Plc won't refund transactions she says she didn't make or otherwise authorise.

what happened

Miss C went on holiday with a group of relatives and their partners. She says a family member was paying for the trip, so she only took a relatively modest amount of cash, and also made a £57.44 withdrawal on 22 April 2019.

Between 23 April and 2 May 2019, her card was used for £637.77 of transactions she says were made without her permission. Miss C still had her card with her and hadn't noticed it was missing. She checked her online banking on the evening of 8 May 2019, then reported the transactions the following morning, first thing after she got to work.

Miss C says aside from the one withdrawal, she didn't use her card on holiday as she didn't need it. She kept her card in her phone case, along with her driving licence, and several times she left her phone with the bar staff to charge. Miss C says she didn't record her PIN or tell it to anyone, but it was her date of birth.

Santander held Miss C liable for the payments in dispute. It felt there wasn't a likely way someone could've learned or guessed Miss C's PIN without her permission.

Our investigator looked into things independently, and upheld the complaint. He said in the circumstances it made sense why Miss C might not have noticed her card was missing, and it seemed she was unaware of the disputed transactions until she checked her online banking and reported them. He felt it was likely someone Miss C knew had done this without her permission. He could see why her actions could be considered negligent, but not grossly negligent. He also felt Santander had given Miss C poor customer service over the phone.

Santander didn't agree. They felt Miss C had either authorised the payments or been grossly negligent. So the complaint's been passed to me to decide.

what I've decided and why

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

Having done that, I've come to the same conclusions as our investigator, and for much the same reasons.

Santander's technical evidence shows that the payments in dispute used Miss C's genuine card, and the correct PIN. But this is not enough, on its own, for Santander to hold Miss C liable – it also needs to be able to evidence that the transactions were made because Miss C consented to them, or failed to keep her account safe either intentionally or through acting with gross negligence. Otherwise, Santander has to refund the transactions

Miss C has provided a plausible and consistent explanation about how her card could've gone missing for periods, and why she might not have noticed. It seems reasonable that if her holiday was broadly being paid for her, she wouldn't need to use her card beyond the cash withdrawal at the start. And it seems plausible that either the resort staff or someone with Miss C could've taken and replaced her card without her noticing. I might not expect Miss C to be overly wary of people she was close to being near her phone. And while her phone was with the staff, it was out of her sight.

It's possible the staff guessed that Miss C's PIN was her date of birth, and looked at her driving licence to get the date. But I can't say this is what's most likely to have happened. They would've had to assume the number was her date of birth, and then picked the correct four digits from the date on the first try. I think it's more likely that someone close to Miss C did this – they would've had opportunities on previous occasions to overlook her entering her PIN or work out what the PIN was based on, without Miss C having reason to be suspicious.

The person using the account primarily made cash withdrawals, aside from two small point of sale transactions. They kept withdrawing money until the account was empty, then made several more attempts at different amounts to get as much money out as possible. This seems consistent with someone trying to take Miss C's money, who – unlike Miss C – wouldn't have been aware of how much might actually be available.

Miss C's behaviour indicates she was genuinely unaware of the payments. She didn't check her balance during the holiday, nor did she feel she had a need to, so she wasn't aware of the payments earlier. Towards the end of the trip, she tried to pay a phone bill but was unsuccessful. But by that point, the person using her card had already drained her account. If that was Miss C, it seems unlikely she'd then try to pay a bill if she already knew her account had been drained. It looks like she wasn't aware of the transactions until she checked her account after the holiday. Then she reported them without undue delay.

Taking into account everything that's been said and provided, I'm not persuaded that Miss C consented to the disputed transactions.

I've also thought about whether Miss C acted with gross negligence. It seems reasonable to say she acted negligently in leaving her card unattended for periods, and in setting the PIN to a number people could potentially work out.

But gross negligence is a much higher standard than normal negligence. It involves a very serious disregard to an obvious risk. And I don't think I can say Miss C was grossly negligent to ask staff members to charge her phone when the card was with it. I don't think that is so unusual or outright reckless that it meets the bar of gross negligence. And I don't think Miss C had sufficient reason at the time to suspect that someone close to her might try to take the card. Nor did she have good reason to be regularly checking her account or double-checking her card's whereabouts while on this particular holiday.

Similarly, while Miss C's PIN was her date of birth, it wasn't – for example – written down or recorded with the card in a recognisable way, or told to anyone. So I don't think she acted with such recklessness that Santander can hold her liable for the transactions. So in the particular circumstances of this case, I'm not persuaded that Miss C was grossly negligent. I've also looked at the terms and conditions of the account. But I can't see that Miss C deliberately failed to comply with her obligations to keep the account secure in a way that was intentional.

I think this is a finely balanced case, and I understand Santander's point of view. But based on the evidence and the balance of probabilities, I think it's most likely that Miss C did not authorise the disputed payments, and did not fail to keep her account secure either with intent or gross negligence.

Lastly, I agree with our investigator that Santander gave poor customer service to Miss C when she reported the fraud. The staff member's language and tone implied they didn't believe Miss C, despite not even starting an investigation yet, and at points they spoke over her and demanded Miss C only give yes or no answers. I was similarly unimpressed with the tone of the staff member who took Miss C's initial complaint call on 16 May 2019. I agree with our investigator that Santander should pay Miss C an additional £150 as compensation for the upset it caused through poor customer service.

putting things right

Santander UK Plc should:

- refund the disputed transactions, including any related fees;
- for the transactions paid from Miss C's positive balance: pay simple interest to Miss C on those transactions, at the rate of 8% simple a year, payable from the date they were last debited until the date they're returned[†]. This is to compensate Miss C for the time she was without her money;
- for the transactions paid from Miss C's overdraft: refund any interest or charges that Miss C incurred because of Santander debiting the disputed transactions; and-
- pay Miss C £150 compensation for the trouble and upset it caused.

[†] HM Revenue & Customs requires Santander to take off tax from this simple interest. Santander must give Miss C a certificate showing how much tax it's taken off if she asks for one.

I understand Miss C is in an IVA. Miss C may need to speak with her insolvency practitioner about any compensation she receives.

my final decision

For the reasons I've explained, I uphold Miss C's complaint, and direct Santander UK Plc to put things right by doing what I've said above

Under the rules of the Financial Ombudsman Service, I am required to ask Miss C to accept or reject my decision before 9 February 2020

Adam Charles
ombudsman