

## Complaint

Mr S complains HSBC UK Bank Plc trading as First Direct (First Direct) should refund him a payment of £4,900 he was tricked into paying as a result of a third-party scam.

## Background

I've considered the relevant information about Mr S's complaint. I've decided to uphold his complaint.

It's not in dispute that Mr S was the unfortunate victim of an authorised scam payment of £4,900. He was duped over the phone by someone pretending to be an officer from HMRC who informed him he had a tax liability for the above sum and needed to pay it to avoid a warrant for his arrest being issued that day.

The scammer spoofed HMRC's phone number and instructed Mr S to ring First Direct while they were on the line in order to make a payment to what they said was one of HMRC's accountants. Mr S was told he would meet with the accountant in person, but the funds needed to be secured first. Mr S was told to tell First Direct the payment was to his own accountant.

I issued a provisional decision in February 2021 upholding Mr S' complaint. Here were my findings:

*"Under the Payment Services Regulations 2017, Mr S authorised (consented) to the payment. This is the case whether or not he was tricked into making it. So, in terms of the regulations, Mr S is liable for the loss he suffered. But I also need to consider the law, regulators' rules and guidance, relevant codes of practice and what I consider was good industry practice at the time. Having done so I find First Direct ought to have:*

- Monitored Mr S accounts and any payments made or received to counter various risks, including anti-money laundering, countering the financing of terrorism, and preventing fraud and scams.*
- Looked out for unusual transactions or other signs that might indicate Mr S was at risk of fraud (among other things). This is particularly so given the increase in sophisticated fraud and scams in recent years, which banks are generally more familiar with than the average customer.*
- In some circumstances, irrespective of the payment channel used, have taken additional steps, or make additional checks, before processing a payment Mr S was instructing it to make, or in some cases declined to make a payment altogether, to help protect him from the possibility of financial harm from fraud.*

*When Mr S rang First Direct to make the payment, he said he needed to pay his accountant urgently. A payment of this size was clearly unusual for him, given I've seen no history to show payments like this were normal for him, or that he had made payments to an accountant before – he says he hadn't. Mr S also wanted to make the payment urgently, which should've triggered some concern into what lay behind this need. After all, First Direct would understand that victims of scams do often want to make payments due to the pressure they're being put under by scammers.*

*It's telling Mr S was prepared to forego the benefit of the interest rate on his savings account, which would've needed only seven further days to mature. He'd been conscientious to build his savings over a consistent period, making payments totalling £300 each month. And the statements First Direct sent to our service show he'd never made a transfer out of that account before. So, Mr S wanting to undo all of his efforts should've alerted the advisor that something might be wrong.*

*Given the above, I'm satisfied First Direct ought to have been concerned about the nature of the payment Mr S was asking it to make. And it needed to ensure it asked sufficient questions of him and received satisfactory answers to mitigate against the risk of him falling prey to a scam or fraud.*

*First Direct are well placed to understand that the reason a victim of a scam may initially give for a payment may not be what it at first seems. First Direct understands that scammers often coach their victims to present a seemingly legitimate reason for a payment. So, where appropriate, First Direct may need to interrogate the reason behind a payment further, and not just take it at face value.*

*Mr S told First Direct's advisor the payment was to his accountant. He was also asked how he obtained the account number and sort code, which he said were given to him over the phone. But in Mr S's circumstances I don't think these were sufficient questions to discharge First Direct's duty to take reasonable care to protect his interests. Mr S was after all asking First Direct to make a payment that would dissipate most of the funds in his savings and current account. So, while his reason carried an air of plausibility, the advisor still ought to have asked some pre-eminent questions, such as:*

- Why did the accountant need the money so quickly given Mr S was losing out on the benefit of the interest rate on his savings account?*
- Why couldn't his accountant wait for him to realise the interest rate? And what would happen if he waited?*
- What liability was the payment for? And why hadn't it been paid before, given it's a sizeable sum that Mr S appears not to have known about?*
- When did Mr S find out about the payment and by what means?*
- When did he employ his accountant, given this was a new payee?*

*Neither did the advisor warn Mr S of the risk of being scammed before acting on his instruction, which I find is an important omission. If First Direct was concerned about a payment – which it ought to have been here – reasonable care should've been taken to make Mr S aware of the possibility of being scammed. In particular, it would've been important to at least highlight:*

- The sophisticated nature of scams and how genuine they seem.*
- That a customer being contacted to make payment out of the blue to meet an*

*otherwise unknown and urgent liability is a hallmark of being scammed.*

*- What made Mr S think he wasn't being scammed? And what had he done to ensure he wasn't being scammed?*

*Had questions of this nature been asked, I think Mr S's responses would've likely given First Direct further cause for concern. I think he would've revealed he only found out that day about the payment; that he was told he could be arrested if he didn't make payment - the threat of imminent harm being a common ploy of a scammer; and that the payment was to pay tax owed to HMRC – a known scam.*

*The above questions are not overly cautious given the nature of the payment Mr S wanted to make and the effect it would have on his accounts. And had questions of this type been asked, the situation would've likely unravelled, and Mr S or First Direct would've realised Mr S was at imminent risk of being scammed. I find at this point, it would've been a proportionate step for First Direct not to have executed the payment until more robust checks were done. This would've most likely resulted in Mr S not making the payment, being as once he became suspicious, he contacted HMRC independently and verified the scam.*

*First Direct say had they probed Mr S further about the payment he may still have provided answers in line with what the scammer told him to say. So, whatever it asked, a reasonable explanation would've been given. But I haven't seen evidence to conclude this would've been the most likely outcome if First Direct had asked more probing and robust questions.*

*Mr S was told to say the payment was to his accountant who he would meet the following week to go through his taxes at HMRC. Barring the fact that the accountant wasn't his – it was his accountant in terms of the person he thought he was going to deal with - this was in fact what he thought was going to happen. Mr S has said he wasn't told not to reveal his alleged HMRC tax liability, that he was at risk of arrest or to give a cover story. And I believe him.*

*It's important to remember Mr S's concern was not that his account was at risk or that he needed to take secret action to prevent a fraud. Instead, he was concerned he was at risk of arrest if he didn't make an urgent payment to HMRC. He became suspicious once the scammer asked for a further £5,000 payment as a deposit before meeting the accountant. So, I doubt it would've made sense to him if the scammer had told him to contrive wholly different facts to what he understood the situation to be. From his perspective First Direct had nothing to do with his tax liability, so why would he need to go to lengths to hide this.*

*Even if Mr S did think he couldn't reveal what the reason for the payment was, I suspect his answers would've lacked specificity, arousing further concern. Or he would've needed to discuss what was being asked of him with the scammer while on the phone - which would've rung alarm bells for First Direct. Again, I doubt Mr S would've had a script or a grand narrative to tell First Direct, as this would've raised his suspicions if he was asked to do this.*

*On balance, I'm satisfied First Direct failed to ask sufficient questions of Mr S when he gave his instruction for payment. And had First Direct done more, Mr S wouldn't have fallen victim to the scam.*

*I've considered whether Mr S should bear some responsibility by way of contributory negligence. However, it's clear that up to and including the time of authorising the payment, he was convinced he was speaking to an officer from HMRC. He'd specifically asked this person to terminate the first call he had with them, and to ring back from HMRC's number, which the person did. I understand why receiving a call from what appeared to be the genuine number was convincing. And I believe him when he says he didn't know phone numbers could be spoofed in this way. I doubt he is privy to the various methods scammers employ to come across as genuine.*

*From how Mr S has described the call, he was clearly very concerned about his immediate future. In other words, he was more susceptible to the instructions of the scammer considering he thought his liberty was at stake. So, I understand why he wanted to ensure he wasn't arrested. And in this context, I don't view Mr S's actions as akin to contributory negligence. So, I don't find he should bear some liability for the payment he was tricked into making. He was simply the unwitting and blameless victim of a sophisticated scam.*

*In the circumstances, I am satisfied First Direct should fairly and reasonably reimburse Mr S for the loss he suffered without any reduction together with interest to compensate him for being deprived of the money he lost. I am satisfied that had the fraudster not taken the money from Mr S, the part which constituted his savings would have remained in his savings account and he would've realised the interest rate on that account.*

*I also think it appropriate to make an award of £500 for the distress and inconvenience Mr S suffered. In reaching that conclusion I am mindful that his loss was ultimately caused by the callous act of a fraudster and it was an unauthorised transaction, but I find First Direct clearly could've prevented the loss by asking more pertinent questions. It was clear Mr S was vulnerable at the time, having only recently lost his job and the funds represented his hard-earned savings and remaining account balance which he'd have considered very important. From listening to the calls Mr S's comments clearly show he was in turmoil due to the loss, and he was very worried about his immediate future. He revealed on one of his subsequent calls to First Direct that his doctor had prescribed him medication to help him to cope. I find a substantial part of this worry could've been prevented had First Direct done more."*

Mr S accepted my findings, but First Direct rejected them and raised a number of points. In summary it says:

- I didn't reference the basis for my provisional findings. I didn't mention the Banking Protocol – which doesn't apply to Mr S' complaint – or the BSI code to which First Direct aren't a signatory.
- My findings conflict with the recent judgement in the case of Philips v Barclays.
- Mr S was confident on the phone and there was no reason to be suspicious about the payment. Tax liabilities often fall due in January and customers sometimes need to make larger payments. So, there was no need for First Direct to be concerned and ask Mr S further questions.
- I failed to place enough weight on Mr S telling First Direct the payment was to *his* accountant. He was untruthful. So, my findings about what Mr S would've said or done had First Direct asked further questions aren't reliable.
- Mr S ought to carry some liability for his loss. He was negligent and should've taken

measures to ensure he wasn't falling victim to a fraud or scam, particularly when threatened with arrest. A reasonable person would've done this. Simple online searches would've revealed he was being scammed.

## 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've decided to uphold the complaint for the same reasons I gave in my provisional decision, which are repeated above and form part of this decision.

First Direct has highlighted a number of concerns, which I'll now address.

First Direct says I have not referenced the specific rules and regulations on which I based my provisional decision. But I am mindful that my fellow ombudsman and I have referenced the relevant rules, codes of practice and good industry practice at the time in many previous decisions, both to First Direct and published on our website. But as a reminder to First Direct, I'll now detail those considerations.

In deciding what's fair and reasonable in all the circumstances of a complaint, 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 time.

In broad terms, the starting position at law is that a bank is expected to process payments and withdrawals that a customer authorises it to make, in accordance with the Payment Services Regulations (in this case the 2017 regulations) and the terms and conditions of the customer's account. That was the case in July 2017, and remains so now, and I have taken that into account when deciding what is fair and reasonable in this case.

But that is not the end of the story:

- Regulated firms like First Direct are also required to conduct their 'business with due skill, care and diligence' (FCA Principle for Businesses 2) and to 'pay due regard to the interests of its customers' (Principle 6).
- Firms also have a longstanding regulatory duty '*to take reasonable care to establish and maintain effective systems and controls for compliance with applicable requirements and standards under the regulatory system and for countering the risk that the firm might be used to further financial crime*' (SYSC 3.2.6R, which has applied since 2001). And over the years, the FSA and its successor the FCA have published a series of papers setting out non-exhaustive examples of good and poor practice found when reviewing measures taken by banks to counter financial crime.
- Firms are required to comply with legal and regulatory anti-money laundering and countering the financing of terrorism requirements. In July 2017 those requirements included maintaining proportionate and risk-sensitive policies and procedures to identify, assess and manage money laundering risk – for example through customer due diligence measures and the ongoing monitoring of the business relationship (including through the scrutiny of transactions undertaken throughout the course of the relationship).

- The law itself also recognises that a bank may be liable to its customer if it makes a payment in circumstances where it has reasonable grounds (although not necessarily proof) for believing that the payment instruction was an attempt to misappropriate the funds of its customer (known as ‘the Quincecare duty’). I am mindful, however, that the courts have interpreted Quincecare narrowly and the circumstances of this complaint are different to that case and I am not suggesting Quincecare applies in this case, only to make the point that the broad legal position that a bank is expected to process payments that a customer authorises is not absolute and Quincecare (like the other matters I have referred to here) is an example of that.

In addition, as a matter of good industry practice in July 2017, I consider firms should in any event have taken proactive steps to:

- identify and assist vulnerable consumers and consumers in vulnerable circumstances, including those at risk of financial exploitation (something also recognised by the FCA in recent years and by the British Bankers Association’s February 2016 report ‘improving outcomes for customers in vulnerable circumstances’);
- look to identify and help prevent transactions – particularly unusual or out of character transactions – that could involve fraud or be the result of a scam.
- in relation to branch transactions – follow the Banking Protocol when available. I have not found the banking protocol relevant to Mr S’s complaint, considering the transaction didn’t take place in a First Direct branch.

I am aware that First Direct considers too high a standard has been applied to what is expected of it in terms of identifying payments that might indicate a consumer is at risk of financial harm; and it has referred to ‘the Quincecare duty’ in support of its argument in referring to Philips against Barclays. I am mindful that the courts have interpreted Quincecare narrowly and the circumstances of this complaint are different to that case. Our ‘fair and reasonable’ remit also enables us to take account of regulatory and industry standards beyond the narrow legal duties considered in that and other court cases.

In any event, I am not suggesting Quincecare applies to this case, however the broad legal position that a bank is expected to process payments that a customer authorises is not absolute – and Quincecare (along with regulators’ rules and guidance, relevant codes of practice and good industry practice at the time) is an example of that.

First Direct says it had no reason to suspect Mr S was at risk of financial harm. So, it didn’t need to ask more questions than it did. And, it says Mr S didn’t state the payment he wanted to make was urgent.

But Mr S presented a payment instruction to First Direct, which meant he would spend all his savings shortly before he would realise the interest rate on the account. It’s fair to say most customers wouldn’t want to forgo the benefit of interest unless necessary, and I’ve seen no reason to understand why this was any different for Mr S. In this context, it’s reasonable to conclude Mr S presented First Direct with an urgent need to make the payment. He didn’t need to state the word “urgent” for First Direct to understand this.

Mr S’ payment request was also unusual for him because of its size. He hadn’t made a payment close to this size before. So, taken together I’m more than satisfied First Direct

ought to have been concerned enough to have asked Mr S more questions before processing the payment.

First Direct points to the fraud taking place at a time when tax assessments are due and large liabilities might arise. It's true tax liabilities may be more likely in January. So, some customers might make larger payments than normal around this time. But a sudden tax liability can also be a hallmark of a potential tax scam. And First Direct ought to know scammers may be likely to conduct tax scams around the time tax assessments are submitted.

First Direct says I didn't account for Mr S saying he thought tax liability might be due to an error with his employer. I have accounted for everything Mr S said. But him rationalising how the liability could have arisen isn't a reason for First Direct to not have asked him more questions before acting on his instruction.

First Direct understands HMRC would never ring a customer about a debt the customer doesn't already know about. So had First Direct asked Mr S more questions, I'm satisfied he would've revealed he wasn't sure how the liability arose, he'd first heard about it through a phone call, and he was told his liberty was at risk if he didn't make payment. Together this would've alerted First Direct that Mr S was probably falling victim to a scam.

First Direct says the reason Mr S provided - he was paying his accountant - was enough to be satisfied he wasn't at risk of financial harm. I disagree. First Direct is well placed to understand customers often believe they are speaking to legitimate persons or businesses when in fact they are being scammed. So, while a reason might sound plausible, it doesn't mean First Direct shouldn't ask further questions when appropriate. I don't find the questions I suggested are interrogatory in the way First Direct suggests, considering Mr S' circumstances.

Mr S was making a payment to a new payee for a large sum he'd never paid before, and he was using up all his savings. So, it was reasonable for First Direct to at least ask Mr S more about how and why the payment request arose, what liability it regarded, why couldn't it wait and what would happen if he waited. Had First Direct done so, I'm satisfied it would've realised Mr S was about to fall victim to a scam

First Direct says I can't know what Mr S would've said if he was asked further questions. And it's true, I can't know for certain what Mr S would've said or done. But I must make findings based on the balance of probabilities. So, I must decide what I think is more likely than not to have happened.

Mr S has been consistent and given specific detail about what the fraudster told him. First Direct say because Mr S said the payment was to *his* accountant, he must've been given a cover story. But from Mr S' perspective, he was meeting the accountant assigned to him by HMRC – so I don't find the use of 'his' particularly telling. And I don't find it's enough to conclude he wouldn't have discussed his tax liability if asked about it.

Mr S says he realised something was wrong when the fraudster acted outside the realms of what was plausible in relation to what he'd been told. The fraudster asked for a further payment to meet the accountant, which didn't make sense to Mr S. So, the veil of the scam was lifted. If Mr S had been given a cover story to tell First Direct, I think this would've

caused him to question what the fraudster was telling him. It wouldn't make sense to him why he would need to deceive First Direct regarding a tax liability.

First Direct says a reasonable person would have taken steps to query what the fraudster was telling them. But in the circumstances Mr S faced, I find the reasonable person could have fallen victim to the same scam without taking the steps First Direct suggest.

I'm satisfied the reasonable person would think they were speaking to a genuine employee given the phone number appeared as the authority's genuine phone number. And I'm not persuaded a reasonable person ought to know fraudsters can spoof telephone numbers. The reasonable person probably doesn't know the extent of HMRC's powers or how it communicates. And HMRC is an arm of the government, so it's quite possible they wouldn't doubt the possibility of arrest. So, I don't find Mr S negligent or that he should bear some of the liability for his loss.

I don't place weight on the remarks Mr S made after he'd been defrauded. It's normal for someone to blame themselves when they've been tricked in the way Mr S was – victims of a scam often do.

### **Putting things right**

HSBC UK Bank Plc, trading as First Direct should:

:

- Pay Mr S £4,900.00
- Pay interest on the sum of £3,600 which was transferred out of Mr S's savings account at the saving's rate he would've realised if the funds had stayed in his savings account from the date of loss to the date of refund.
- Pay 8% simple interest per annum on the sum of £1300 which was paid out of Mr S's current account from the date of loss to the date of refund.
- Pay Mr S £500 for distress and inconvenience.

### **My final decision**

I've decided to uphold this complaint. HSBC UK Bank Plc should pay redress in accordance with my directions given above.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 30 April 2021.

Liam King  
**Ombudsman**



