

The complaint

Mr P complains that MBNA Limited won't refund him a payment of £3,097.50 which he says he didn't authorise.

What happened

The background to this complaint is well known to both parties, so I won't repeat everything here. In brief summary, Mr P has explained that whilst he was on holiday a payment of £3,097.50 was taken from his MBNA credit card which he says he didn't authorise. MBNA and Mr P didn't agree on things, so Mr P referred his complaint about MBNA to us. Our Investigator was unable to resolve the matter informally, so the case has been passed to me for a decision.

I sent Mr P and MBNA my provisional decision last month. Now that both parties have had opportunity to comment further, I'm now ready to explain my final decision.

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 so, and in the absence of comments made in response to my provisional decision, I've reached the same conclusions as in my provisional decision and for the same reasons. I've explained my reasons again below.

The Payment Services Regulations 2017 are relevant here. In short, the payment service provider (MBNA) will generally be liable for unauthorised payments; and a payment out of someone's account can only be authorised if the payer consented to it. So, whilst MBNA has provided technical evidence from which I'm satisfied it's most likely Mr P's genuine card and PIN were used together to authenticate the payment, this isn't enough on its own to say the payment was authorised.

To decide Mr P authorised the payment, I'd also need to be persuaded Mr P most likely consented to it. But it's important to highlight consent here, under the applicable regulations, doesn't depend on Mr P having been fully aware of the details of the payment at the time he presented his card and entered his PIN (if indeed he did so). So, for example, if there was a mistake or Mr P was somehow tricked into paying a different amount to what he expected, and possibly to a different merchant, this wouldn't necessarily mean he didn't consent to the transaction for the purposes of the regulations; for Mr P to be regarded as having consented to the payment under the regulations, it would be enough for him to have agreed to make a payment and willingly entered his details to authenticate it.

I understand Mr P has said he never noticed his card missing. And I note there are genuine transactions either side of the disputed transaction indicating the card stayed within Mr P's possession. Mr P also says he hadn't knowingly disclosed his PIN. Whilst I appreciate he's also said he was in a different place at the time compared to the location recorded on the transaction, a transaction won't always show accurate information about the location it was

authenticated from, so I don't think this means Mr P couldn't have authenticated the payment.

So, it's not easy to see here how the payment could have been authenticated by someone other than Mr P without his consent. Mr P has speculated that it's possible when he first arrived at the airport with his wife and they were paying for car hire, that someone could have seen him enter his PIN and then distracted him whilst they took his card and put through a separate (unauthorised) transaction – the disputed one for £3,097.50. But I can't see any persuasive evidence this really happened (although I can understand why Mr P has suggested it as a possibility). And the airport car hire appears to have been paid for on 25 January 2023, several days before the disputed transaction was instructed. So, I don't think this is what most likely happened.

Without, in my view, any other persuasive possibilities about how someone else could have authenticated the payment using Mr P's card and PIN without his knowledge or consent, but given I don't doubt Mr P's integrity here, it seems to me that the most likely possibility, therefore, is that Mr P has somehow ended up authorising a payment for an amount and to a merchant he doesn't recognise as a transaction he made himself.

In this regard, I understand Mr P has said that around the time of the disputed transaction his wife asked him to pay for a bag, which he paid for using a different card. But Mr P says it's possible he tried to pay for the bag first using his MBNA card but somehow this payment was shown to him as unsuccessful, when perhaps it wasn't (and was instead, unbeknownst to him, for a different amount and to a different merchant to what he had been led to believe). In the absence of any other plausible suggestions, it does seem most likely this is how the disputed transaction occurred. But, for the purposes of the regulations, Mr P still consented to the transaction because he intended to make a payment and he presented his card and entered his PIN; as already explained, the fact the payment was neither for the amount nor the merchant he thought he would be paying, wouldn't invalidate consent for these purposes.

So, whilst I totally understand Mr P's strength of feeling, this means I think it's most likely that he *did* consent to the transaction in the way consent is decided under the regulations for determining whether a transaction is authorised or not. So, I can't say MBNA was required to refund the transaction as unauthorised. I appreciate Mr P may think this is unfair; but if Mr P has paid a different amount to a different merchant than he was expecting, this isn't automatically MBNA's fault, and this wouldn't automatically make the payment refundable as unauthorised. However, if Mr P was tricked (which is a possibility), this would mean MBNA's fraud prevention measures – and whether they operated as they reasonably ought to have done – would become relevant.

MBNA would generally be expected to process payments a customer authorises it to make. That said, as a matter of good industry practice MBNA should have taken proactive steps to identify and help prevent transactions – particularly sufficiently unusual or uncharacteristic transactions – that could involve fraud or be the result of a scam.

So, at the time this payment took place, I would have expected MBNA to be looking out for anything noticeably unusual in the transactions Mr P was making. And if it saw anything sufficiently unusual about a payment, or pattern of payments, I would have expected it to check with Mr P before processing them. However, there are many payments made by customers each day and it's not realistic or reasonable to expect a credit card provider to stop and check every payment instruction. There's a balance to be struck between identifying payments that could potentially be fraudulent, and minimising disruption to legitimate payments. And in this case, I agree with the Investigator, that even if Mr P was tricked into making this payment, I don't think I can reasonably say the payment was so unusual for his account that MBNA reasonably ought to have intervened in it before it was executed. This is because Mr P's prior transactions showed he was in South Africa, so I don't think the location ought to have been a flag. I also don't think it would be so unusual for customers to use their credit card for one-off larger payments like this from time to time. This means I'm not persuaded I can say MBNA unreasonably missed an opportunity to prevent the transaction before it was executed.

Turning to address recovery, there are mechanisms whereby a consumer can sometimes recover card payments. However, in this case Mr P made the payment from his MBNA credit card to Vodacom. This means the merchant here, for chargeback purposes, would be Vodacom. And even though it looks like Mr P didn't realise he was paying this merchant, it seems unlikely he would have been able to show, for chargeback purposes, that the merchant didn't provide the products or services they were instructed to (albeit most likely not to Mr P). So, taking this and everything else into account, I don't think MBNA's decision to not pursue a chargeback was unreasonable, given I don't think it most likely would have succeeded.

I understand MBNA offered to pay Mr P compensation of £100 for service issues, which Mr P didn't accept. MBNA has offered to reinstate this, and I think this is fair.

In summary, it seems to me that Mr P has mistakenly authorised this payment; but authorise the payment under the regulations he nonetheless has. This means MBNA isn't reasonably required to refund it as unauthorised. Mr P may have been tricked into the payment, but if he was, I don't think this was MBNA's fault because I don't think the payment was so uncharacteristic that I could fairly say MBNA should have contacted Mr P about the transaction before it executed the authorisation to make it. And as the payment was made to what appears to be a legitimate merchant, it seems to me that the payment wouldn't have been recoverable through normal card payment recovery methods, because, for example, chargeback is concerned with the merchant paid – and whether, here, the merchant provided the goods or services intended, but not whether those services were specifically provided to Mr P, nor whether Mr P was tricked into the payment. I'm sorry, as I know Mr P will be disappointed, but all of this means I'm not persuaded I can tell MBNA in this case to refund the transaction.

My final decision

For the reasons explained, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr P to accept or reject my decision before 8 January 2024.

Neil Bridge
Ombudsman