

The complaint

Ms K complains about the way American Express Services Europe Limited (AESEL) dealt with a claim she made to it.

What happened

The background facts are well known to the parties so I won't repeat them in detail here – instead I will cover these briefly and focus on giving reasons for my decision.

Ms K bought a flight ticket from a travel agent ('the agent') but says that due to the Covid-19 pandemic she had to change her itinerary.

Ms K says the airline assured her it would agree to a refund or change of flight but the agent was not able to arrange this. She wants a refund of the ticket cost.

Ms K went to AESEL to raise a claim to recover her money but it did not uphold her claim.

Ms K brought her complaint about AESEL's claim handling to this service. Our investigator did not uphold the complaint and Ms K asked for an ombudsman to make a final decision.

I issued a provisional decision on this case which said:

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

I have considered the submissions by the parties but I won't be commenting on everything – only those matters I think are central to this complaint. This is not intended as a discourtesy but reflects my role in resolving disputes informally.

I am sorry to hear about Ms K's situation which came about as a result of the pandemic. However, it is worth noting here her complaint is against AESEL– which is not the supplier of flights or travel agency services. When considering what is fair and reasonable I look at AESEL's role as a provider of financial services. In this case the relevant protections available for AESEL to have considered as ways to fairly reimburse Ms K are Section 75 of the Consumer Credit Act 1974 ('Section 75') and the chargeback scheme.

AESEL does not appear to have considered Section 75 here at all or in any detail even though it was relevant to the dispute. I think that it fairly should have, and that it should have upheld said claim. As a result I have not considered chargeback.

Section 75

Under Section 75 Ms K is in certain circumstances able to hold AESEL responsible for a breach of contract or misrepresentation by a supplier in respect of goods or services bought using her credit card.

Certain requirements have to be in place for a valid Section 75 claim. I have considered these, and note that the requirements are met for Ms K to have a claim in respect of the travel agent she paid for the tickets. However, she can't claim against AESEL for the direct actions of the airline because she didn't fund an agreement with it via her AESEL credit card.

Because Ms K's claim is in respect of the actions of the agent then it is the agreement between it and Ms K I have focused on here in deciding if AESEL has acted fairly.

My starting point is that the agent appears to have fulfilled its basic contractual agreement with Ms K in arranging the initial flight she requested. There is no persuasive evidence that the original booking was incorrectly made or the flight itself did not go ahead as planned.

The key issue is that due to the pandemic Ms K wanted to either change or have her flights refunded. Here, as Ms K has pointed out the airline was willing to allow flexibility and change or refund tickets but the agent failed to recognise this and told Ms K that its records showed the flight was in fact non-refundable. When Ms K insisted that the airline was allowing flexibility for her booking the agent said it would find out more – but then didn't get back to her before her flight departed and she lost the value in her ticket.

The agent's agreement with Ms K

I note that in promoting its flexible options the airline does point out the following:

If your ticket was purchased through a travel agency, booking changes/cancellation policies may vary. Please contact your travel agency for details.

So the key question for me is whether the agent had some other contractual policy in relation to fare conditions and changes that would differentiate from those set by the airline.

Ms K purchased her flight at the end of October 2021 so I have looked at the 2020 terms and conditions of the agent that appear to apply to this booking. I note the following terms within these which indicate that the agent does not have its own restrictions and in fact bookings are governed by the 'Third Party Provider' (which might be an airline or provider of accommodation):

When you make a booking for a Service using the Website, you will be entering into a contract with the relevant Travel Service Providers for that Service.

Cancellations can be made for flights, Package Holidays and car hire by calling [agent number]..

All such requests will be dealt with on behalf of the Travel Service Providers concerned. Customers do not have an automatic right of cancellation unless such rights are provided by the individual Third Party Providers under their Rules and Restrictions (which are provided to the Customer prior to booking)..

If a Customer wishes to cancel any part of a booking, and if such cancellation is permitted by the applicable Third Party Provider, then an [agent name] cancellation administration fee will apply in addition to any fees imposed by the Third Party Provider. Please see the table below for the specific fees..

Similar terms are also expressed in relation to a request by a customer to change a booking. Furthermore the agent in webchats had said things to Ms K such as 'we still have to followed [sic] policy of your ticket and airlines' indicating that its own policy is dictated by the airline.

Overall, I am satisfied that contractually the agent has agreed it is essentially acting on behalf of the airline and will follow the policy of the airline in respect of fare conditions including cancellation or change requests. This is further reinforced by the fact that the agent later offered to go back to the airline to confirm the fare conditions.

The airline's change/cancellation policy applicable to Ms K's booking

The question now is for me to determine what airline policy relates to Ms K's booking regarding cancellation or change.

I note the airline states on its website that an international booking of the kind Ms K made between 11 June 2020 and 30 November 2021 is eligible for free rebooking or a refund in the event that someone is unable to travel due to travel restrictions imposed by the destination (resulting from the pandemic). So prima facie, and based on the information provided to me by Ms K I consider that this flexible policy applies to her ticket and overrides any usual fare conditions that would have been in place at the time of booking.

The contradictory information Ms K was given by the agent

Ms K was told her booking was non-refundable by the agent. I note her booking confirmation under '[Name of airline] flight rules and regulations' also says that the booking is non-refundable. This somewhat contradicts what the airline had advertised in regard to its fare conditions at the time.

However, Ms K has provided compelling information about what she saw when she booked the flight about the additional flexibility on offer (in light of the pandemic) for the fare booked through the agent. Ms K has also screen grabbed a booking process screen for a similar flight with the same airline which shows that 'General Rule Does Not Apply' in the area describing penalties for changes. There is also reference to this exception in respect of tickets issued on or before 30 November 2021 which ties in with the information on the airline's website regarding when bookings have to be made by to benefit from the overriding flexible fare conditions.

Ms K has also communicated how important the flexibility was to her during the pandemic and that had she known she wouldn't get the flexible conditions through the agent she would have gone and booked directly with the airline. This persuasively adds to the overall picture here that Ms K did see information during the booking process that showed she was in fact booking a flexible flight.

So overall, it appears plausible here that the confirmation email Ms K received from the agent and its systems might have mistakenly classed the ticket as non-refundable (because it usually isn't refundable) despite it being subject to the airlines special temporary fare conditions.

In any event it is worth noting again that the agent is very clear its fare conditions are dictated by the airline's policies and not it – so even if Ms K's booking confirmation does say it was non-refundable this is not necessarily an accurate reflection of the airline's fare conditions applicable to Ms K's purchase at that time. I am satisfied that the terms applicable to the fare are those shown by the airline's website. For clarity I don't consider this to be a case of the terms changing after Ms K's booking either – as when Ms K booked the airline's flexible policies were in place.

Even if I accepted there were some mistake in the conditions the agent attributed to the original booking I don't think this is Ms K's fault. Furthermore, even if the lack of clarity at the

time of booking was attributable to the airline the agent appears to have had a reasonable amount of time before the flight was due to leave to go back and simply confirm the situation with the airline – but it appears not to have done so

I note that under the Consumer Rights Act 2015 ('CRA') the service provided by the agent to Ms K must be done with reasonable 'care and skill'. The CRA does not define what this is but noting the agent's role here (including its agreement to deal with cancellation/change requests on behalf of the airline) I don't think it was unreasonable to have expected it to:

- *attribute the correct cancellation/change conditions to the original fare;*
- *in the event of a request such as Ms K's to then clarify said conditions with the airline in a reasonable timeframe and in any event before her flight was due to leave (here it had more than enough time - about 3 weeks from her request to change or cancel where she explained in some detail the flexible fare conditions she had seen the airline offering in respect of her booking).*

I presently consider there to be persuasive evidence that the agent breached its contract with Ms K under its explicit terms in respect of its policy regarding cancellations/refunds and/or the implied term as to 'care and skill' via the CRA. Therefore, Ms K has a valid claim for breach of contract against the agent. As a result I don't think that AESEL acted fairly in the way it handled the claim made to it by Ms K. Therefore, with Section 75 in mind it should now refund her the price of the ticket (£1,021.36) minus the £25 administration fee she would have paid under the agents terms and conditions had it properly arranged the cancellation or change for her as it should have done.

It appears Ms K contacted AESEL in April 2022 and it gave her a substantive response to her chargeback claim on 12 May 2022. I think it was in a reasonable position to consider and respond to a Section 75 claim around this time even if that were after chargeback had been initially ruled out. So I think any reworking should fairly be calculated from 31 May 2022.

My provisional decision

AESEL should re-work Ms K's credit card as if it had refunded £996.36 to it on 31 May 2022 (including removing applicable interest and charges). If this results in a credit balance it should refund this to Ms K with simple interest from the date of credit balance to the date of payment. The interest should be calculated at a rate of 8% yearly.

If AESEL considers it should deduct tax from the interest award it should provide Ms K with a certificate of tax deduction so she may claim a refund from HMRC if appropriate.

Both parties accepted my 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.

Both parties have accepted my provisional findings. Based on this I see no reason to change my findings here.

Putting things right

AESEL should put things right as set out below for the reasons given in my provisional findings (as copied above).

My final decision

American Express Services Europe Limited should re-work Ms K's credit card as if it had refunded £996.36 to it on 31 May 2022 (including removing applicable interest and charges). If this results in a credit balance it should refund this to Ms K with simple interest from the date of credit balance to the date of payment. The interest should be calculated at a rate of 8% yearly.

If AESEL considers it should deduct tax from the interest award it should provide Ms K with a certificate of tax deduction so she may claim a refund from HMRC if appropriate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms K to accept or reject my decision before 10 January 2024.

Mark Lancod
Ombudsman