

## **The complaint**

Miss R says Marks & Spencer Financial Services Plc, trading as M&S Bank, has treated her unfairly in relation to a transaction on her credit card which paid for flights for her and another.

## **What happened**

Miss R purchased return international flights with an Airline costing a total of £2,062.44 using her M&S card. The return leg of the flight was scheduled for 21 August at 18:50 local time, due to arrive in London on 22 August 2022 at 09:55. On Miss R's way to the airport, she was advised the flight had been rescheduled to depart at the estimated time of 21:20. Miss R boarded the flight late and further delays were incurred keeping them on the ground for some time before take-off. The Airline said the delay was due the changeover flight being delayed due to a sick passenger. It was then announced they'd be stopping off on the way to London to refuel due to fuelling issues the departing airport. The flight arrived at London at 15:47 local time. The total delay being more than six hours. The Airline paid Miss R £234.70 towards some her expenses caused by the delay, but it declined to pay her what she wanted. Miss R tried to get more compensation from the Airline, but it refused.

So she took the dispute to M&S in March 2023. M&S have said they couldn't raise a chargeback because Miss R brought the issue to them outside the time limits for a chargeback to be raised. It also said there had been no breach of contract because the delays had been caused by circumstances which were outside of the Airline's control. So M&S felt there was no persuasive reason for a claim to be successful under Section 75 of the Consumer Credit Act 1974. Accordingly it didn't refund Miss R. She felt this was unfair, so she brought the dispute to this service.

Our investigator felt M&S didn't have to do anymore. And Miss R remained unhappy and so this complaint came to me for a 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.

Miss R used her M&S credit card to pay The Airline for the flights. This means that section 75 of the Consumer Credit Act ('s.75') can apply to the transaction. This provides that where Miss R has a claim against a supplier of goods or services (in this case The Airline) in respect of a misrepresentation or breach of contract she will have a 'like claim' against M&S as creditor subject to the provisions of s.75.

Also, Miss R's M&S credit card is part of a card scheme which is operated by separate company. This scheme has rules which include giving M&S an avenue for card transactions to be disputed with the relevant merchant, such as The Airline, namely through the chargeback process. The decision maker on chargebacks is the scheme itself and not M&S. So it is possible that M&S could take Miss R's dispute as far as it could in the chargeback process and Miss R still not be successful in getting a refund.

This decision is solely about M&S in relation to whether it did what it should have, and whether it treated Miss R fairly in consideration of her dispute with The Airline. This decision isn't directly about the Airline, which isn't within this Service's jurisdiction for complaints regarding chargeback and s.75.

*Could M&S challenge the transaction through a chargeback?*

Miss R doesn't dispute that she used her M&S credit card. Nor does she dispute the amount, date, or any other details about the transaction itself. So I don't think M&S could've challenged the payment on the basis Miss R didn't properly authorise the transaction given what I've set out.

M&S is required to consider whether there is a reasonable prospect of success when it is considering whether to go through the chargeback process or not. If it does go through the process, then it must do so properly. And it can fairly decide to not proceed at any stage if it doesn't think there remains a reasonable prospect of success with that particular chargeback.

M&S didn't raise a chargeback here because it said it was 'out of time'. I've considered the scheme rules and the significant time period between the delayed flight and Miss R approaching M&S. This time period is significantly outside the scheme time limits for chargebacks. So M&S hasn't done anything wrong by not taking the chargeback further. This is because had it tried to the scheme rules meant it was out of time and thus would have been unsuccessful. So she hasn't lost out because of M&S' approach to chargeback.

## *Section 75*

Before deciding on whether there is breach or misrepresentation here there are some requirements set out in s.75 which have to be met before these issues can be considered. One of these tests is around financial limits and having considered these I think that Miss R's claim meets the financial limits criteria as it was above the minimum threshold and below the maximum threshold.

S.75 also requires there must be a Debtor-Creditor-Supplier arrangement in place (often referred to as a 'DCS arrangement'). Having considered the facts here I'm satisfied there is a DCS arrangement in place. Accordingly if Miss R's claim is made out M&S can be held liable to a 'like claim' to that against the Airline.

*was there a breach or material misrepresentation that M&S are responsible for?*

I'm not persuaded that M&S has treated Miss R unfairly by concluding that The Airline hadn't

breached the contract or made a material misrepresentation essentially for the same reasons as the Investigator in this case.

An important factor in this matter is that Miss R hasn't provided any persuasive evidence of where M&S has treated her unfairly in its consideration of her claim to it. The onus here is on Miss R to show that M&S have treated her unfairly, not just that she's lost out in some way. Just because she's suffered these delays it doesn't necessarily follow that M&S has treated her unfairly in its consideration of the matter and this is the crux of the matter here. And M&S should only do more if the Airline is required to do more-as this is a 'like claim'.

I also note that Miss R hasn't pointed to the contract she had with the Airline and explained which terms of that contract it broke. She has repeatedly pointed out to the consequences of the delays and the distress and inconvenience she suffered, but she hasn't demonstrated that these delays were the fault of the Airline or which contract terms it broke in its agreement with her.

I've seen persuasive evidence that the delays were due to the presence of a sick passenger on board and fuelling issues at the departure airport due to the fuelling equipment at the airport (owned by the airport and not this Airline). Neither of these are the Airline's fault or responsibility, without evidence to the contrary. And Miss R hasn't provided evidence that the Airline caused the sickness or problems with fuelling or that it failed to take reasonable steps to mitigate these causing these delays.

It is also of note that the flight times do not make up part of the contract between Miss R and the Airline (condition 9). Also under the Airline's terms and conditions for flight cancellation and long delays, it explains their policy operates in line with EC Regulation No 261/2004. This regulation states if the air carrier can prove a defence of '*extraordinary circumstances*', no compensation is payable. Article 5 (3) of the Regulation provides that compensation is not payable in circumstances where the carrier can prove that a delay or cancellation was caused by extraordinary circumstances which could not have been avoided if all reasonable measures had been taken.

I've considered the evidence here and I've not seen any persuasive evidence from Miss R that the Airline was at fault for the person being sick or for the equipment at the departing airport. And I've seen that the Airline stopped over in order to refuel in order to get to London. And as I've said, just because things went wrong, and Miss R suffered as a result of things going wrong it doesn't necessarily follow that M&S have more to do. So all in all I'm not persuaded M&S have considered Miss R's claim unfairly.

For the sake of completeness I'll address some of Miss R's arguments. I've considered everything she's said, but I'll only address her key arguments as I see them. Miss R makes the argument her rights have been violated by her not being able to leave the plane once boarding was completed. The Airline is responsible for the safety of the flight and its passengers and passengers do not have a contractual right to leave the plane at any time of their choosing.

Miss R points to rules requiring refunds for certain delays but these apply to delays prior to boarding and as I've pointed out the flight times do make up part of the contract. Miss R

points out she wasn't told of some the reasons for the delays at the time. She has no contractual right to this information, so this doesn't make a difference.

Miss R wants a full refund, plus other costs. However the service was provided albeit with delay. Accordingly it would be substantially unfair to make a full refund here. All that Miss R would be entitled to would be any compensation commensurate with the delay suffered if there had been a breach of contract or material misrepresentation that made a difference. And I'm satisfied that M&S doesn't have to do more here.

Miss R points to the customer service provided both on the flight and latterly by the Airline. M&S aren't responsible for these. M&S can only be responsible if the Airline breaches the contract or materially misrepresents matters to her. And I'm satisfied M&S hasn't treated Miss R's claim to it unfairly.

I appreciate this is not the decision which Miss R wants to read. And although Miss R has made many significant arguments here and she's demonstrated that the delays had a significant impact on her. She hasn't been persuasive that M&S has treated her unfairly in considering her claim. And having considered everything she has said and indeed the circumstances in the round I'm not persuaded that M&S has treated her unfairly. Accordingly Miss R's complaint is unsuccessful.

### **My final decision**

For the reasons set out above, I do not uphold the complaint against Marks & Spencer Financial Services Plc, trading as M&S Bank. It has nothing further to do on the matter.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss R to accept or reject my decision before 5 December 2023.

Rod Glyn-Thomas  
**Ombudsman**