

## **The complaint**

Mr W complains that HSBC UK Bank Plc trading as first direct won't refund the money he lost when he fell victim to an investment scam.

## **What happened**

The details of this complaint are well known to both parties. So rather than repeat them all again here, I'll briefly summarise the key points.

I understand Mr W saw an advert for an investment company, F, on social media. He replied to the advert and was contacted by their agent. They guided him to download remote access software, which they used to help set up a cryptocurrency wallet in his name – so he could purchase cryptocurrency to load to the scam platform.

Mr W says he was shown F's platform, and also received two credits. This reassured him F were legitimate. And the promised returns of 10-20% encouraged him to keep investing. Unfortunately, F were operating a scam.

Mr W says he authorised the payments initially, but was later tricked into passing over or entering OTP codes on the understanding this was necessary for him to receive funds. Instead, money was debited from his credit and debit cards.

In total, accounting for the credits, Mr W has lost over £108,000 to the scam. Most payments were made from his first direct current account. But one payment, which he says was unauthorised, was also taken from his credit card account.

Mr W called first direct following the card payments and said they should have been credits. First direct said it couldn't help due to him sharing the OTP codes. Mr W subsequently engaged a lawyer and attempted to take legal action against F, but didn't succeed in recovering any funds. He subsequently complained to first direct that it failed to protect him against the scam.

First direct didn't uphold Mr W's complaint. It said it couldn't help as the funds were transferred to his wallet, not directly to the scammers.

Unhappy with this response, Mr W referred his complaint to our service. Our investigator didn't uphold it. She thought the payments had all been authorised. And she didn't think first direct could have stopped the scam – noting that it had called Mr W about the scam payments on at least two occasions and he had wanted to proceed. And he'd gone on to pay a further £6,000 to F several months later after having been told they were a scam.

Mr W appealed the investigator's outcome. He said first direct's enquiries during the calls didn't go far enough, and if they had – such as establishing that the payments were ultimately going to F – it would have realised he was being scammed.

In August 2023, I issued my provisional decision explaining I wasn't minded to uphold this complaint for these reasons:

*I'll first consider those payments which it's accepted were authorised. In line with the Payment Services Regulations 2017 (PSRs), first direct is expected to execute authorised payment instructions without undue delay. So, although Mr W ultimately lost the funds to the scam, the starting position is that he's liable for the payments.*

*But there are some situations where we believe that banks—taking into account relevant rules, codes and best practice—ought to have identified a fraud risk, so should have looked at the wider circumstances surrounding the transaction before making the payment.*

*Here, we know first direct identified several of the scam payments as unusual – and it discussed them with Mr W over the phone. So the key here is whether it reasonably did enough to protect him at that point. If it didn't, I'd need to consider whether further appropriate intervention was likely to have succeeded in uncovering the scam.*

*Having listened to the calls, I agree with Mr W that first direct should have probed further before agreeing to complete the payments. However, I'm not persuaded that doing so would have succeeded in preventing his further losses.*

*There are a few reasons for this. First of all, I'm mindful Mr W told first direct he had done his research and was satisfied the company he was paying was legitimate. But if he had looked F up at the time, it appears he would have seen that the UK financial services regulator, the FCA, had issued a warning that F were suspected of operating in the UK without the required authorisation.*

*While Mr W thinks this means first direct should have established the scam during the call, I wouldn't reasonably have expected it to look up the companies or complete research on his behalf. Instead, I'd expect it to guide him on what he could do to check that the company was legitimate. But as he sounded confident that he had already done adequate due diligence, I'm not persuaded it's likely that further questioning or warnings from the bank would have prompted him to complete further research. He's told us he was already very persuaded by F's website and the credits he'd received.*

*Mr W also told first direct he hadn't been asked to give a code to anyone, which I understand wasn't correct; he had shared an OTP code with F to authorise an earlier card payment. He mentioned to first direct over the phone that he knew some people were sceptical about cryptocurrency. And I've seen other references to him having been coached by the scammer. That suggests he was unlikely to have divulged the full details of what he was doing – which would have made it harder for first direct to have identified the scam.*

*I also think it's significant that, several months after the scam ended, Mr W paid a further £6,000 to F (via another account) in a bid to get them to release his funds. By that point, I can see he had already reported his concerns about F to the bank. And his lawyer had told him they thought F were operating fraudulently. As Mr W continued to pay in similar circumstances, after F had all but been confirmed as a scam, I don't consider it likely first direct would have succeeded in preventing him from making further payments even if it had completed more extensive intervention.*

*However, I've considered what Mr W has reported about the card transactions made towards the end of the scam – which he says were unauthorised. It's important to clarify that, as the PSRs set out, authorisation depends on whether the transactions were authenticated correctly – and whether the account holder consented to them.*

*Authentication doesn't seem to be in dispute; it's agreed that the payments were processed correctly. So whether the payments were authorised comes down to whether Mr W consented to them. I appreciate he says he didn't. But consent has a particular meaning under the PSRs. It happens when Mr W, or someone acting on his behalf, completes the agreed steps to make a payment.*

*That means if Mr W completed the steps of filling in his card details, and then the OTP, he would have authorised the payment – regardless of whether he understood that completing those steps would result in the payment being taken.*

*The testimony I have about what Mr W did in relation to these payments is a little unclear. There seem to be some contradictions in what he's said at certain points. I don't doubt he's given us his honest recollections. As he was being tricked, that has understandably caused some confusion about what happened. But it does have a bearing on my judgment – given that, where information is incomplete or contradictory, I must decide what's more likely to have happened on the balance of probabilities.*

*To expand on this: according to the call note from when Mr W reported the credit card payment to first direct, he said it should have been a credit rather than a withdrawal. But he also said he had entered his card details and input the OTP. That suggests to me the payment was authorised, in line with the PSRs, even though Mr W was tricked into making it.*

*That would also fit with what Mr W has told us about remote access. There is mention of F using this to guide him on what to do. And my understanding is that, given his phone, F wouldn't have been able to take control and complete the steps themselves using remote access.*

*I also note that, in the letter his lawyer sent F, they referred to the credit card payment as being unauthorised – but not the debit card payments. It's unclear why this allegation was omitted. But as above, if the same process was followed for the debit card payments, they would also be considered authorised. And I think it's likely the same process was followed, as the payments seem to have all happened in quick succession during the same call with F, who guiding Mr W on what to do.*

*That said, I have seen other occasions where Mr W seems to have disputed sharing or inputting his card details, and instead suggests he passed the OTP codes to F on the understanding he would receive credits. But even if he didn't authorise the payments, first direct wouldn't be liable under the PSRs if the payments were made as a result of him failing with intent, or gross negligence, to comply with the account terms or keep his personalised security details safe.*

*I'm mindful here that, from what I've seen, Mr W shared an OTP code with F earlier to authorise a payment. So I do question why he would have thought that doing this again would result in him receiving a credit when it had been previously resulted in a payment being taken.*

*I'm also mindful that, in order to make all these payments, it seems that Mr W would have needed to share the OTP numerous times on the same day – on the understanding he would then receive credits. But had he checked his accounts in between providing these codes, he would have seen that he hadn't received anything – and money had instead been taken.*

*The text that accompanied the code also started by saying “NEVER share this code”. It also set out that it was to make a purchase, including setting out the amount and the retailer. Mr W says he didn’t read the message. But given how the message started, I think he must have seen the warning from first direct.*

*Furthermore, when calling first direct after he realised what had happened, he himself said he was ‘deeply suspicious’ during the call. So he thought something was wrong. Yet, if it wasn’t him inputting the details directly, he was repeatedly sharing OTP codes – despite the message warning him not to do so – without verifying if he was in fact receiving credits. And having also followed the same steps prior to make, rather than receive, a payment. So I think he did show a serious disregard of the risk, amounting to gross negligence. So regardless, I’m not persuaded first direct is liable to refund him for these payments.*

*I’ve also considered if first direct could have done more to help Mr W recover the funds when he reported the scam. But as the funds were sent via his cryptocurrency wallet, they didn’t remain in the account they were sent to directly, meaning first direct couldn’t have retrieved the transfers. Not could it have raised successful claims for the card payments – as again, such claims would only be considered against the merchant paid directly. The merchant who provided the wallet isn’t linked to F, and it provided the expected service by crediting Mr W’s account in line with the payment requests received. So unfortunately first direct couldn’t have recovered the loss.*

I invited both parties to provide further comments or evidence. First direct responded to accept my findings, but Mr W didn’t agree. He has raised further points, as I’ll cover below.

### **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, I’ve decided not to uphold the complaint. This is largely for the same reasons given in my provisional decision – as set out above, and which forms part of my final decision. So I’ll now focus on addressing Mr W’s response to my provisional decision.

In doing so, I only intend to summarise Mr W’s response. But I’d reassure him that I have read and considered his response in its entirety. If I don’t reference a particular point or piece of evidence, that isn’t because I haven’t considered it. Rather, it’s because I don’t consider it necessary to explain my decision.

Mr W says his essential point is that first direct failed to appropriately intervene with these payments. And if it had asked basic questions, it could and would have prevented him from making the payments.

As my provisional decision explained, I do agree with Mr W that first direct didn’t do enough. But that alone doesn’t mean I consider it fair to expect first direct to reimburse Mr W for his losses. That depends on whether I think first direct’s failings had a material impact on him.

For the reasons given in my provisional decision, I’m not persuaded they did. I can’t look at the situation with the benefit of hindsight; I must think about what was likely to have happened at the time. Given Mr W’s confidence in F, and his interactions with first direct during the call I’ve listened to, I’m not persuaded better intervention was likely to have persuaded him there was cause for concern such that he would have looked into F further and realised it was a scam.

Mr W is unhappy my decision didn't reference that first direct "lost" the recording of an earlier intervention it says took place. Where information is incomplete, I must decide what is more likely to have happened. Without the call, I can't know whether first direct did enough. But I have listened to an intervention call a few days later. And based on that, I concluded that first direct didn't do enough. So I've not made an assumption, based on this lack of information, to Mr W's detriment. Rather, I've made the judgment that – as it didn't do enough in the call I've listed to – it's unlikely it did a sufficient job previously.

Mr W questions my reference to the £6,000 he paid F later on. I appreciate the purpose of the payment was different, as he was hoping to recoup his loss. But I do still consider it relevant to my determination of whether first direct ought to have been able to prevent the earlier loss. The fact he continued to pay F, after being warned it was likely a scam, makes it appear less likely that first direct ought to have been able to dissuade him at an earlier stage.

If guided on what to check, Mr W says he would have found the FCA warning for F and therefore have realised he had been scammed. While that's certainly possible, I'm not persuaded it's more likely than not – which is the standard on which I'm making my decision.

As mentioned, Mr W told first direct he had done his research and, in my view, didn't sound particularly open to completing further checks. He has told us the scammer had already gone to great lengths to gain his trust and appear legitimate. I understand why that naturally affected his actions, and I'm aware how sophisticated and convincing these scams can be. But, as explained in greater detail in my provision decision above, that does also affect my judgment of how he was likely to have responded to further probing by his bank, and whether he was likely to have taken further action in response.

During the call, it sounded to me as though Mr W had been primed to expect pushback and scepticism from his bank – but was determined to continue. This is a clever, and often effective, scam tactic. But I have to bear in mind that a bank's ability to effectively engage and uncover a scam will be guided on what it is told when speaking to the customer.

I appreciate this comes down to a judgment call, as we can't know for sure what would have happened if first direct had done more. But I have made this judgment impartially, based on the available evidence. And, having carefully weighed this up, I'm not persuaded that further probing by first direct about the payments would likely have uncovered the scam.

In response to specific questioning during the intervention call I've listened to, Mr W didn't reveal some details that likely *would* have raised alarm bells – such as that he had shared a code with the merchant. And he seemed to be expecting scepticism from the bank. So I'm not persuaded he would have been particularly forthcoming about what he was doing, even if questioned further. I'm therefore not persuaded first direct would have known enough to be able to issue an effective warning or guidance on what the risks were, and what else Mr W should do, such that the scam would have been uncovered.

I appreciate this will be disappointing for Mr W. He has clearly lost out to a cruel and sophisticated scam, which has had a big impact on him. Both in terms of financial loss, and the emotional impact of having been tricked. But in all the circumstances, I'm not persuaded it's fair for me to expect first direct to take responsibility for his losses.

### **My final decision**

For the reasons given above, my final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 13 October 2023.

Rachel Loughlin  
**Ombudsman**