

## **The complaint**

Mr S complains about how American Express Services Europe Limited, trading as American Express, dealt with his claims for refunds of his purchases of a bed and some perfume.

## **What happened**

In February 2022 Mr S ordered a bottle of perfume online, and paid £82 for it with his American Express credit card. He thought that it would be delivered the next day. But when his order was placed, the website told him that the delivery would be in two days. Mr S immediately tried to cancel the online order, and on the same day he went to a local store to buy the same product there. However, the merchant did not cancel the online order, and told him the perfume would still be delivered. Mr S says it never arrived.

Mr S asked American Express to raise a chargeback about the perfume. At first, the transaction had not been posted on his account yet, so he was told to try again later. He called again in March, and was promised a call back, but he was not called back, and a chargeback dispute was not opened until May 2022. He complains about that.

The merchant successfully defended the chargeback claim by saying that the perfume had been delivered, and by providing a street map showing where the delivery had taken place. Mr S complains that American Express should not have accepted that evidence, because his house is not next to the street but is about 100 metres back from it, behind another house, and the map does not show that the delivery occurred there. He also points out that the merchant did not have evidence of him signing for the delivery, or a photo of the goods being delivered, so for all American Express knew it might have been delivered to the wrong address (which has happened to him before).

In August, Mr S bought an ottoman bed, using the same credit card. He paid £600 for the bed to be delivered and assembled. But he says the bed was not assembled properly: it would not close, making it impossible to sleep on, and there were sharp screws and staples sticking out of it, some of which fell off onto the floor; he says he cut himself on one. He immediately complained to American Express, to the seller, and to the delivery company. Nothing was done (other than the delivery company offering him £20), and meanwhile Mr S had to sleep on the floor. He had no room for another bed while this bed was there, and sleeping on the floor was bad for him because he is disabled and on medication. His joints swelled up. After 12 days or so, he had the bed taken away and disposed of by a third party. A day or two after that, the merchant offered to collect the bed and give a full refund. By then it was too late. Mr S complains that American Express did not raise a chargeback for that purchase.

Mr S also complains that some of American Express's call handlers were rude, did not acknowledge that he was disabled, gave him wrong information, and cut him off on the phone. He says American Express did not properly investigate these matters.

American Express said a chargeback for the bed would not have succeeded, because the chargeback rules required Mr S to return the bed to the merchant. It said the merchant had specifically told Mr S not to dispose of it. American Express had not considered the matter

under section 75 of the Consumer Credit Act 1974, because its policy was not to do so unless asked to by its customer. Mr S brought this complaint to our service. Later on, American Express offered to pay Mr S £100 for its customer service failings in the perfume case.

Our investigator did not uphold this complaint. She thought the seller of the perfume had provided enough evidence to show that the perfume had been delivered at the correct address, and that there was not enough evidence to show it hadn't been delivered. The chargeback had inevitably failed because Mr S had disposed of the bed. She accepted that American Express had not needed to consider the bed under section 75, because of its policy. She had listened to the relevant call recordings and she did not agree that the call handlers had been rude. She thought that American Express's offer of compensation for the customer service issues was fair.

Mr S did not accept that opinion. He asked for an ombudsman's decision. I wrote a provisional decision which read as follows.

### **What I've provisionally 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 am minded to uphold Mr S's complaint in part. I will explain why. I will start with the bed, since that is the part I propose to uphold.

#### The bed: chargeback

It does not appear to be in dispute that the bed was faulty, since the merchant agreed to allow Mr S to reject it for a full refund. But in case I am mistaken about that, I am satisfied from Mr S's testimony and his accompanying photos of the bed, and his emails to the merchant describing the problem at the time, that the bed was not of satisfactory quality.

If the chargeback dispute had been upheld in Mr S's favour, then the remedy would have been to take the bed back and refund his purchase in full. Unfortunately, by the time the merchant agreed to do just that, Mr S had already got rid of the bed. That made it impossible for the chargeback dispute to be upheld in his favour, regardless of his reasons for doing that. So I cannot uphold his complaint about the outcome of the chargeback dispute.

#### The bed: section 75

I do not accept that American Express did not have to consider the matter of the bed under section 75 of the Consumer Credit Act, just because Mr S did not ask it to. He didn't know he could, and I agree with him that American Express should have told him that was an option. I understand that that is not their policy, but I think they should have done so because of the FCA's Principle 6, which reads:

“A firm must pay due regard to the interests of its customers and treat them fairly.”

It was a statutory implied term of Mr S's contract with the merchant that the delivery and assembly of the bed would be carried out with reasonable skill and care. There is sufficient evidence that this term was breached, because the bed was clearly not assembled properly. So I think that a claim under section 75 would have easily been upheld, but for the same problem which thwarted the chargeback dispute.

The fact that Mr S disposed of the bed is certainly a complication, but is not necessarily fatal to his claim. It usually would be, because the usual remedy would be to return the bed and receive a refund. However, I think this case is different, because of the urgency which was introduced to the situation by his disability, which the merchant knew about.

Mr S is severely disabled and has several illnesses (he has provided medical evidence to support this). He says he is on a social services safeguarding plan because he is vulnerable. He says he told the merchant about his disability before he placed his order for the bed, and I have seen his complaint email to the merchant after it was delivered, in which he mentioned it.<sup>1</sup> In two follow-up emails he said the bed could not be used and he was sleeping on the floor; in the second of those emails he said this was causing problems to his back.

Mr S has told me that there was not enough room for a second bed; he could not get a new bed while this bed was in his house. So he couldn't sleep properly while he still had the bed, and meanwhile this was exacerbating his health problems.

The reason I have mentioned all of this is because a person who has a claim or potential claim for breach of contract has a duty to mitigate his loss. That is, someone who has received inadequate goods or services and is suffering adverse consequences as a result cannot just sit idly by and wait for someone else to fix it, and then expect to be compensated for consequences which they could have avoided, or at least ameliorated. They have to take such steps as they reasonably can to try and avoid or reduce those consequences. Whether a complainant does this or not is a factor I will normally take into account in complaints about section 75 claims, or (as in this case) complaints about a failure to consider a potential claim under section 75.

In Mr S's case, mitigating his loss meant getting himself a replacement bed. In order to do that, he needed to make room for it by moving the bed he couldn't use out of the house. I asked him why he didn't just get someone to move it to just outside his house, instead of removing it from the premises altogether. He said if he had, it would have been blocking his drive.

I think that under these circumstances, Mr S was not acting unreasonably in having the bed removed. He did not do that right away; it's not as if he waited only a day or two and then got rid of it, which I might have thought was premature. He waited for nearly two weeks, during which time the delivery firm came to his house to fix or inspect the bed; they neither fixed it nor took it away.

American Express has pointed out that the merchant specifically told Mr S in an email not to dispose of the bed. Unfortunately, that was 17 days after the bed was delivered, by which time he had already disposed of it.

That email also contained the merchant's offer to either replace the bed or to allow Mr S to reject it. That might not be an unreasonable timescale normally, but in Mr S's case, as I've said, there was greater urgency, and the merchant knew the reasons why.

So although I would not normally uphold a claim about goods which cannot be returned, I think the facts of this case mean that Mr S should not be entirely deprived of a remedy, because he was not acting irresponsibly but was seeking to mitigate his loss when he

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<sup>1</sup> In fact, the email actually says it was his mother who was disabled and that the bed was for her, but I asked Mr S to explain this, and he said that this was an error made by the person who wrote the email for him. I accept this explanation because of the medical evidence he has provided, and because several of his other emails state that they were written on his behalf.

disposed of the bed. When he did that, he did not know how much longer it would take for the merchant to resolve the matter.

In coming to this conclusion, I have had regard to the Consumer Rights Act 2015, and in particular, to sections 23(2), 20(7), and 24(5). Section 23(2) says that if a consumer requires a trader to repair or replace goods, the trader must do so “within a reasonable time and without significant inconvenience to the consumer”. I don’t think that happened in this case.

However, section 20(7) requires a consumer to make the goods available for collection or repair. I cannot ignore the fact that Mr S breached that duty (even though I think that his reasons for doing so were not unreasonable), and so he lost his statutory right to reject the bed or to have it repaired. So I must consider what alternative remedy it would be fair to require instead. And I think that is a price reduction.

Section 24(5)(c) says that if the trader is in breach of section 23(2) – which I have found is the case here – then the consumer has the right to reduce the price, as an alternative remedy to rejecting the goods. That reduction can consist of part of the price, or the whole price, so I need to decide which would be fair in this case.

I think that my starting point must be a partial reduction, because the merchant has been deprived of the bed. If the merchant had taken the bed back, then it might have been able to repair it and sell it to someone else. It can no longer do that. So there is an argument for finding that Mr S should only get a partial refund.

On the other hand, it does not seem quite fair to me that Mr S should be out of pocket for having bought a bed which – for no fault of his own – he was never able to use, just because he needed somewhere to sleep and was trying to avoid further injury to his back.

(It also might not have been possible to repair the bed, but there is no way of knowing whether that is the case, and the merchant lost the opportunity to find out. So I make no findings about that point either way.)

Because of the circumstances I have described above, I am currently minded to uphold this part of Mr S’s complaint and to require American Express to refund the entire purchase price of the bed.

#### Damage caused during the delivery of the bed

Mr S says that during the delivery, a concrete step was damaged outside his house. He infers that this must have happened when the delivery men put the bed down on the way, because it was heavy, and that this was done with sufficient force to damage the step. The loose step is a hazard to him.

I expect he is right about what happened. But in order to uphold his complaint about that, I would need to be satisfied that the delivery men not only caused that damage, but that they did so negligently. And not every accident is always proof of negligence. Sometimes an accident can just happen without it being the result of somebody being careless. So while I can see why Mr S has complained about that, I do not think I should uphold this complaint point.

#### The perfume

I do not uphold Mr S’s complaint about the perfume, for broadly the same reasons as our investigator. I do accept Mr S’s arguments that the evidence that the perfume was not delivered is hardly conclusive, and that better evidence would often be available when

something has been delivered. The spot on the map, showing the delivery location, is not precisely where his house is; there is no photo and no signature. On balance, I believe him when he says he never received the perfume.

But my remit here is not actually to decide whether Mr S received the perfume, or whether the merchant conclusively proved that it was delivered. Rather, my role is to assess how American Express dealt with his chargeback dispute. American Express does not decide the outcome of chargeback disputes itself; rather, it decides whether it has enough evidence to pursue a contested chargeback dispute to the next stage (which is arbitration by the card scheme operator). The merchant's evidence was not conclusive, but I think it would have been enough to defend the chargeback dispute, and so I think American Express acted reasonably when it decided it had taken the matter as far as it could.

I could stop there, but it might (or might not) help Mr S to come to terms with my decision on this point if I say that the location on the map could just represent the location of the delivery van parked in the street, rather than where the driver posted it through a letterbox or left it on a porch. (I am not saying that is necessarily the case, only that the merchant could have made that argument, if the dispute had proceeded further.) It is not proof that the delivery was made to the wrong address (even if in fact it was).

#### Customer service issues

I have listened to the relevant call recordings. I don't think anyone was rude to Mr S, or that anyone failed to acknowledge that he was disabled. There was one call that was cut off while he was on hold, and on the same call the call handler told Mr S that the complaints department does not accept emails. When Mr S challenged that, the call handler told him that she had only worked there for three weeks, and that she hadn't been aware that they could accept emails. She said she would transfer his call to someone else, which under the circumstances was a reasonable thing to do.

I don't think either of those issues were serious enough to warrant financial compensation. But American Express has offered Mr S £100 for some other customer service issues, so I will not interfere with that.

#### My provisional decision

So my provisional decision is that I intend to uphold this complaint. Subject to any further representations I receive from the parties ... I intend to order American Express Services Europe Limited to pay Mr S £599.97 (in addition to the £100 it has already offered him), and to pay simple interest on that payment at 8% a year from the date that transaction was re-debited from his account to the date of settlement.

#### **Responses to my provisional decision**

American Express accepted my decision.

Mr S said he should be awarded additional compensation for the distress and inconvenience he had endured because of the bed. He also repeated his arguments about the perfume, and said that £82 was a lot of money to him.

I reconsidered this case in the light of Mr S's remarks, and while I remain of the view that I cannot uphold his complaint about the perfume, I now think I should have awarded him some compensation for his distress and inconvenience in relation to the bed (which I have already described above). I put that to American Express and asked it to comment.

American Express argued that my provisional decision was already very favourable to Mr S, seeing as the bed was not returned. It said that the refund and interest were enough. I can see its point, since I have already explained why I would not normally have upheld this complaint at all, so a full price reduction – with interest on the refund – is indeed generous. But that award is only to compensate Mr S for his financial loss; it does not address the inconvenience and discomfort of being without a usable bed for twelve nights, exacerbated by a disability and swollen joints. On reflection, I don't think it would be right for me not to recognise that in my award. I think £200 is fair compensation for that.

### **My final decision**

My decision is that I uphold this complaint in part. I order American Express Services Europe Limited to:

- Pay Mr S £599.97 (in addition to the £100 it has already offered him for separate matters);
- Pay simple interest on that payment at 8% a year from the date that transaction was re-debited from his account to the date of settlement; and
- Pay him £200 for his distress and inconvenience.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr S to accept or reject my decision before 16 April 2024.

Richard Wood  
**Ombudsman**