

The complaint

Mr N is unhappy with how American Express Services Europe Limited (AESEL) handled a claim he made to it.

What happened

The background facts of this complaint are well known to the parties – I will only summarise these and focus on giving reasons for my decision.

Mr N purchased a hair treatment using his AESEL credit card. He is unhappy with it and says he did not get the results he was expecting and wants a refund.

Mr N made a claim to AESEL and it considered matters in respect of Section 75 of the Consumer Credit Act 1974 ('Section 75') and declined the claim. Mr N then complained to it about the outcome of his claim.

Mr N brought his complaint about the outcome of the claim to this service. Our investigator did not uphold the complaint.

Mr N disagrees. In summary he says:

- He paid for something he did not receive.
- He has submitted a report by a qualified dermatologist which should be sufficient to show he didn't get results.

The matter has been passed to me for a 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.

I have considered the evidence submitted by the parties but not commented on it all – only those things I consider to be particularly relevant. This isn't intended as a discourtesy but reflects the informal nature of our service in resolving disputes.

I am sorry to hear about Mr N's dissatisfaction with the treatment he purchased. However, it is important to keep in mind that AESEL is not the supplier of treatments here. When deciding if it has acted fairly I am only looking at its role as a provider of financial services. In doing so I consider how it might have been able to help Mr N get his money back. Section 75 is particularly relevant here so I have focused on this.

Section 75

Section 75 in certain circumstances allows Mr N to have a '*like claim*' against AESEL for misrepresentation or breach of contract by a supplier of goods and services paid for using his credit card.

Section 75 has technical criteria that needs to be satisfied in order for there to be a valid claim in respect of the actions of a particular supplier. For example, relating to who was involved in the agreement, how it was paid for and what the goods or services cost. In this case we have quite limited information about the nature of the contract agreed with the supplier (which I will discuss later on). However, based on what I do have I am broadly satisfied the criteria is met for Mr N to have a valid claim against AESEL for a possible breach of contract or misrepresentation by the supplier in respect of the treatment he purchased.

In order to determine if there has been a breach of contract by the supplier I have considered any specific terms and conditions of the service Mr N bought along with any terms implied by consumer law.

In this case I consider the Consumer Rights Act 2015 is particularly relevant as it implies terms into consumer contracts in respect of goods and services as follows:

- that services will be performed with '*reasonable care and skill*'

It is important to note here that Mr N purchased what is a complex medical service and something which I do not have expertise in. It is something which involves possible complications and side effects involving the human body. It is commonly known that there are many variables with a medical treatment – and unlike some other services there is often a reasonable expectation that things may not always turn out as planned (and relevant consents and disclaimers agreed). So judging whether the supplier has acted without reasonable care and skill or breached the contract in some other way (even if discussions took place about a desired course of action at the outset) is not straightforward. This challenge would have been similar to that facing AESEL when deciding the claim.

It is particularly challenging here with a lack of paperwork to show what was explicitly agreed between the parties (along with any conditions on this). This service (unlike a court) is not able to compel witnesses for cross examination either – which makes getting to the bottom of things much more difficult. So in considering AESEL's response to the claim I have factored this in.

I note that Mr N provided a summary to AESEL about his dispute with the supplier – that he paid in good faith for hair removal treatment (to deal with sweating) and that he was told by the supplier that it had very good results based on a number of treatment 'cycles'. Mr N explained to the supplier that he wasn't getting results even after a number of cycles and that he ended up with itchiness and a negative impact on his sleep. He also referred to his dermatologist whom he said he contacted about the issue to seek an opinion on the treatment.

Overall I don't see persuasive evidence reasonably available to AESEL at the time to show an express term of the contract has been breached (or a misrepresentation has taken place in respect of what Mr N would receive as part of the treatment). In making this finding I also note here that the correspondence from the supplier to Mr N denies a contractual provision has been broken and insists that Mr N got what was agreed.

In considering whether there was persuasive evidence that the procedure was not carried out with reasonable 'care and skill' I note that the supplier in its back and forth correspondence to Mr N insists the treatment was carried out according to relevant guidelines and that Mr N did not previously mention (nor did he evidence) the side effects he is claiming now. It strongly refutes Mr N's claim for a refund. It has also mentioned that the treatment was showing results but Mr N stopped coming regularly and did not complete the

recommended course of treatment.

It is important to note that even if I accepted that AESEL should have concluded Mr N had received poor results from the treatment (and currently that isn't clear from the evidence) this in itself this will not necessarily demonstrate a lack of 'care and skill' - which is focused on the manner in which the service was performed.

I note Mr N has produced a medical report to support his case –it looks like AESEL might not have been sent this when considering the claim. However, even if it had been I am not sure it changes things in any event. The report is not independently appointed, is somewhat general and does not go into detail about the expected standards in that particular industry and whether the supplier fell below these. It is also difficult to rely on here considering the wider allegations by the supplier that Mr N didn't complain of side effects during the treatment and didn't participate in the plan as required.

In summary, while there are clearly two sides in disagreement here (Mr N and the supplier) I think there isn't sufficiently clear evidence of a breach of contract or misrepresentation to have expected AESEL to have upheld the Section 75 claim. As I have indicated, the subject matter is a complex medical treatment, and there is a lack of information about what was agreed and provided by the supplier, conflicting allegations between the parties, along with limited expert information. And all this makes things more challenging here.

For completeness I have considered chargeback, which it appears AESEL discontinued due to lack of evidence. The chargeback scheme is dependent on the particular rules of the card scheme and isn't guaranteed to succeed. For similar reasons to those I have identified above regarding the lack of paperwork, conflicting accounts of the parties and complex nature of the dispute it is also difficult for me to fairly say that AESEL should have pursued a chargeback further, and that it would have likely succeeded in any event.

Once again I am sorry to hear about Mr N's disappointment with the treatment – but I don't think AESEL acted unfairly in turning the claim down here. It is also worth underlining that this service (unlike a court) is limited in its ability to compel and cross examine witnesses, furthermore I am not able to make awards for loss of amenity in any event (which relates to compensation for what Mr N has said about the ongoing side effects he has). With this in mind it might be that Mr N is able to consider alternative ways to pursue his claim against the supplier, such as court. If so he should consider seeking independent legal advice on this.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr N to accept or reject my decision before 20 November 2023.

Mark Lancod
Ombudsman