

The complaint

Mr W complains that Bank of Scotland plc trading as Halifax didn't do enough to protect him from the financial harm caused by an investment scam company, or to help him recover the money once he'd reported the scam.

What happened

The detailed background to this complaint is well known to both parties. So, I'll only provide a brief overview of some of the key events here.

In February 2018 Mr W saw an advert on social media for a company I'll refer to as "O", which stated it accepted investments for as little as £10. Mr W thought the investment was genuine because he'd heard a lot about cryptocurrency and the fact celebrities had made a lot of money, and because it was advertised on a social media platform he trusted.

He clicked on a link to O's website and completed a contact form. He was then contacted by someone claiming to be a broker working for O, who advised him to invest £250, which he transferred from his Halifax account on 1 February 2018. Later the same day, the broker told him he should invest more, so he paid a further £5,750.

After sending the money, he searched O online and found a phone number, which he called for confirmation the broker really worked there. Satisfied O was genuine, he transferred a further £5,000 on 8 February 2018.

When Mr W asked to make a withdrawal, he was told he'd have to wait 30 days. And after 30 days, he was told he'd have to wait another 30 days, at which point he realised he was the victim of a scam. He contacted Halifax, but it said it was out of time to raise a chargeback dispute.

Mr W wasn't satisfied and so he complained to Halifax, but it refused to refund the money he'd lost. It said he hadn't done enough to protect himself and he'd failed to complete any independent research to verify O was genuine. It said if he'd completed proper due diligence, he'd have established O wasn't authorised by the Financial Conduct Authority ("FCA").

Mr W complained to this service with the help of a representative. He said Halifax failed to intervene when he made the payments. He had believed the investment was genuine because he wasn't an experienced investor, he thought the social media platform vetted its advertisers, and he had contacted the number he'd found to confirm the broker was genuine. He did authorise the payments, but he wouldn't have gone ahead if he had any inclination this was a scam.

Mr W's representative said Halifax should have intervened as he'd made three payments to a new payee linked to cryptocurrency that totalled £11,000 within the space of 9 days. They said the payments should have been an immediate red flag, and more should have been done to protect him. They said he paid £6,000 to a new payee in two payments on the same day, and eight days later, he sent another £5,000 to the same payee.

The representative said Halifax should have contacted Mr W to ask any probing questions and had it identified the payments as unusual and suspicious, it would have been apparent that he was falling victim to a scam. They said it's likely he would have fully explained what he was doing and that everything had originated from a broker, and it should have provided a scam warning.

The representative said the largest payment in November was £896.91 to a kitchen store. In December 2017, the largest payment was £579.45, and in January 2018 the largest payment was £250. They said Mr W's usual financial activity was under £1,000, and he repeatedly shopped in the same places. So, the disputed payments were suspicious and unusual, especially as they were to a new payee that was linked to cryptocurrency.

Our investigator explained that Mr W was out of time to raise a chargeback request and that even if he was in time, he didn't have evidence that he had an available balance and that he tried to withdraw sums equal to, or less than, the available balances on the same day. So, there was no prospect of a valid chargeback claim.

She was satisfied that O was operating a scam. She explained the first payment on 1 February 2018 was in line with other debits and transfers on the account, so she didn't think it was unusual. And at the time of the payment, there were no regulatory warnings with either the Financial Conduct Authority ("FCA") or International Organization of Securities Commissions ("IOSCO") websites. So, she didn't think Halifax needed to intervene.

But she did think the second payment of £5,750 ought to have triggered a warning because it took place on the same day, the payments were to new payee, which was associated with cryptocurrency, and it was high value compared to previous payments on the account. The payment also represented the highest amount paid from the account in a single day and marked a change in the way Mr W had operated the account previously.

Our investigator was satisfied that if Halifax had asked Mr W what the payments were for and the basic surrounding context, it is likely he'd have fully explained what he was doing and that everything had been done over the phone and online with the merchant, in response to which it ought reasonably to have provided a scam warning. It could have invited him to check whether the payee was registered with the FCA. It could also have explained its own customer experiences with merchants like O and the fact there was information in the public domain about the very high risks associated with binary options.

She thought Mr W would have looked more closely into O before proceeding as there's no evidence that he was willing to take high risks or that he had a history of speculative investments or gambling. And she thought he would likely have made further enquiries into binary-options scams and whether O was regulated in the UK or abroad.

Because of this, she was satisfied Halifax failed to intervene in circumstances which might have prevented Mr W's loss, so she recommended it should refund the money he'd lost from the second payment onwards.

Halifax has asked for the complaint to be reviewed by an Ombudsman arguing Mr W should have researched the investment before going ahead, possibly taking independent financial advice. It has said the second payment was a card payment, so a new payee wasn't set up and it could only see the information about the merchant entity as provided by Visa and Mastercard. It also said there is no accurate method of taking FCA lists through to matching against merchant trading information and the FCA and IOSCO warnings weren't published until March 2018.

It also said customers do change their spending habits from time to time, Mr W knew the investment was high risk and there was little information available at the time that would have prompted him to act differently. It said questioning wouldn't have uncovered the fact he was falling victim to a scam and the non-regulation of a company doesn't necessarily mean it's acting dishonestly.

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 reached the same conclusion as our investigator. And for largely the same reasons. I'm sorry to hear that Mr W has been the victim of a cruel scam. I know he feels strongly about this complaint, and this will come as a disappointment to him, so I'll explain why.

I've thought about whether Halifax could have done more to recover Mr W's payments when he reported the scam to it. Chargeback is a voluntary scheme run by Visa whereby it will ultimately arbitrate on a dispute between the merchant and customer if it cannot be resolved between them after two 'presentments'. Such arbitration is subject to the rules of the scheme — so there are limited grounds on which a chargeback can succeed. Our role in such cases is not to second-guess Visa's arbitration decision or scheme rules, but to determine whether the regulated card issuer (i.e. Halifax) acted fairly and reasonably when presenting (or choosing not to present) a chargeback on behalf of its cardholder (Mr W).

However, the scheme sets the rules and there are specific time limits that must be applied. Those rules state that a claim can be brought no later than 120 days than the date of the transaction. In Mr W's case, the claim was referred to Halifax after this time, so this wasn't an option.

I'm satisfied Mr W 'authorised' the payments for the purposes of the of the Payment Services Regulations 2017 ('the Regulations'), in force at the time. So, although he didn't intend the money to go to scammers, under the Regulations, and under the terms and conditions of his bank account, Mr W is presumed liable for the loss in the first instance.

Not every complaint referred to us and categorised as an investment scam is in fact a scam. Some cases simply involve high-risk unregulated investments that resulted in disappointing returns or losses. Some of these investments may have been promoted using sales methods that were arguably unethical and/or misleading. However, while customers who lost out may understandably regard such acts or omissions as fraudulent, they do not necessarily meet the high legal threshold or burden of proof for fraud, i.e. dishonestly making a false representation and/or failing to disclose information with the intention of making a gain for himself or of causing loss to another or exposing another to the risk of loss (Fraud Act 2006).

I've carefully considered the circumstances, and I am persuaded the broker was operating as part of a scam. This is because, in 2018, binary-options, forex and CFD traders operating in the UK were required to be regulated by the Financial Conduct Authority — whereas O was not. Nor were they regulated in any other jurisdiction so far as I am reasonably aware. This indicates they were operating illegally, probably with dishonest intentions. Legitimate firms tend to comply with regulatory requirements.

Further, on 28 March 2018, a warning about O was published by the FCA on their website. That warning stated that the FCA believed the merchant was providing financial services or products in the UK without their authorisation.

There are also several reports in the public domain — e.g. foreign press and online forums— stating that O were scammers. This hearsay is not in itself sufficient evidence of fraud. But in the context of known regulatory facts, it may fairly and reasonably be regarded as circumstantial evidence that helps build an overall picture of scammers dishonestly seeking gains at the expense of others.

Prevention

Although Mr W didn't intend his money to go to scammers, he did authorise the disputed payments. Halifax is expected to process payments and withdrawals that a customer authorises it to make, but where the customer has been the victim of a scam, it may sometimes be fair and reasonable for the bank to reimburse them even though they authorised the payment.

I've thought about whether Halifax could have done more to prevent the scam from occurring altogether. Halifax had an obligation to be alert to fraud and scams, so I need to consider whether it ought to have intervened to warn Mr W when he tried to make the payments. If there are unusual or suspicious payments on an account, I'd expect Halifax to intervene with a view to protecting Mr W from financial harm due to fraud.

The payments didn't flag as suspicious on Halifax's systems. I've considered the nature of the payments in the context of whether they were unusual or uncharacteristic of how Mr W normally ran his account, and I think they were. The first payment was only £250, so I don't think Halifax needed to intervene at that point. However, later the same day, Mr W made another payment of £5,750 to the same payee. Our investigator has said Halifax ought to have intervened at that point and I agree. This is because the amount was higher than any payments Mr W had made in the months prior and I think this constituted a change in operation of the account because it related to an investment, it was to a new payee, and it was significantly higher than the previous spending on the account.

Halifax has said it wouldn't have detected this as a new payee because it was a card payment, so it could only see the information provided by Visa. But I don't accept the fact this was a card payment means Halifax had any less of an obligation to be alert to the fact it was uncharacteristic of the normal spending on the account and I agree with our investigator that it should have intervened when Mr W tried to make the second payment.

Halifax ought to have contacted Mr W to ask questions about the purpose of the payments, whether there was a third party involved and if so, who they were and how he came into contact with them. I'm satisfied that if Mr W had been asked robust questions, he'd have answered truthfully because there's no evidence of him having misled the bank before or that he was told to lie by the broker. And I think he'd have told Halifax that he'd been advised to invest in cryptocurrency by someone he'd met online and who claimed to work for O.

I accept the FCA warning hadn't yet been published, but I'm satisfied Halifax would've gathered enough information to enable it to identify this was possibly a scam. Crucially, in 2018, binary-options, forex and CFD traders operating in the UK were required to be regulated by the Financial Conduct Authority. So, I would expect Halifax to have warned Mr W about the risks associated with the investment and to have explained the importance of checking the FCA register, because if O wasn't regulated by the FCA or any other jurisdiction, it would indicate they were operating illegally, probably with dishonest intentions, as legitimate firms tend to comply with regulatory requirements.

If this had happened, I think it's likely Mr W would have made enquiries into binary-options scams and the various regulatory warnings about the risk of binary-options/forex scams and

he would have realised O wasn't authorised by the FCA, which would probably have exposed that O was operating a scam.

I haven't seen any evidence that Mr W was keen to take risks. He didn't have a history of high-risk investing and I think that if he'd had any inkling this might be a scam, it's likely he would have chosen not to go ahead with the payments. And because of this, I think Halifax missed an opportunity to intervene in circumstances when to do so might have prevented his loss. Consequently, Halifax should refund the money he lost from the second payment onwards.

Contributory negligence

I accept there's a general principle that consumers must take responsibility for their decisions and conduct suitable due diligence but, in the circumstances, I don't think Mr W was to blame for the fact he didn't foresee the risk.

My final decision

My final decision is that Bank of Scotland plc trading as Halifax should:

- refund £10,750.
- pay 8% simple interest*, per year, from the respective dates of loss to the date of settlement.

*If Bank of Scotland plc trading as Halifax deducts tax in relation to the interest element of this award it should provide Mr W with the appropriate tax deduction certificate.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr W to accept or reject my decision before 27 October 2023.

Carolyn Bonnell
Ombudsman