

The complaint

Miss B complains about the way Tesco Personal Finance PLC ('TPF') handled a claim she made to it.

What happened

The background of this complaint is well known to the parties – so I will cover this briefly and focus on giving reasons for my decision.

Miss B purchased some cosmetic treatment from a clinic ('the supplier') and is unhappy with it. In summary, she says there were no results from the treatment and she wants her money back because she looks the same as before. She also says that the experience has had a detrimental impact on her health.

Miss B raised a claim with TPF under Section 75 of the Consumer Credit Act 1974 ('Section 75'). It didn't uphold her claim.

This service looked into the complaint Miss B had about how TPF had handled the claim. Our investigator didn't uphold the complaint. In summary, he concluded there was a lack of evidence to show the supplier of the treatment had breached or misrepresented its contract with Miss B.

Miss B asked for an ombudsman to look at things again and make a final decision. In summary, she says:

- There is more than enough evidence to show she did not get the results advertised; and
- She trusted the treatment would make a difference (and it is common sense that it would not leave her looking the same) and there is nothing she was given to state there will be no improvement.

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 submissions by the parties – however, I won't be commenting on everything here – only what I consider to be central to this complaint. This isn't intended as a discourtesy to either party but reflects my role in resolving disputes informally.

I think it is important for me to make it clear from the outset that I am not upholding this complaint. But also to underline that I am also very sorry to hear what Miss B has said about her experience and how she was hoping it would make her feel better about her appearance but has actually caused her mental health to worsen. I am also sorry to hear about the financial strain she says it has caused on her having to pay for this.

My role here is not to look directly at the actions of the supplier. I am considering the actions of TPF in how it handled the dispute Miss B brought to it, and whether its response to her claim was a reasonable one in the particular circumstances. In doing so I am looking at TPF in the context of how it might have reasonably helped her in light of its role as a provider of financial services.

I know Miss B feels strongly about this case not being upheld. This is not to say that she might not have other routes to pursue his case against the supplier – such as court – but that will be a matter for her to decide and potentially seek legal advice on. All things considered, in its role as a provider of financial services I don't think TPF acted unfairly in not refunding Miss B as part of the dispute she raised with it. I will go on to explain why below.

Here I consider Section 75 particularly relevant so it is this I have focused on. I will also briefly deal with chargeback which is also relevant to disputes about goods or services purchased using a credit card.

Section 75

Section 75 in certain circumstances allows Miss B to have a '*like claim*' against TPF for misrepresentation or breach of contract by a supplier of goods and services paid for using her credit card.

Section 75 has technical criteria that needs to be satisfied in order for there to be a valid claim against TPF 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 I am satisfied the criteria is met for Miss B to have a valid claim against TPF for a possible breach of contract or misrepresentation by the supplier.

Here Miss B purchased a surgical cosmetic treatment to the face. It is described by the supplier as '*lifting and tightening the chin/jaw*'.

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 package Miss B 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 Miss B purchased a complex medical product involving a surgical procedure on the human body and something which I do not have expertise in. It is commonly known that there are many variables and risks with a medical treatment – and unlike some other less complex services there is often a reasonable expectation that things may not always turn out as planned. 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 desired results at the outset) is not straightforward in situations like this. I have taken this into account when deciding if TPF acted fairly in its response to Miss B.

It is particularly challenging with a lack of independent expert evidence to say there has been a breach of reasonably expected professional standards here, further compounded 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.

Furthermore, there do not appear to be any contractual documents provided to TBF setting out what was agreed – which would have made it more difficult for TBF in assessing the claim. I note there are some surgeons notes available but as a non-expert it is difficult to interpret these.

It isn't entirely clear if more paperwork does exist but in the absence of this or any other persuasive evidence (such as an expert report) and considering the complexities and variables involving a medical treatment I am not able to fairly say TPF acted unreasonably in declining the claim Miss B brought to it here. I will explain more.

I have considered what Miss B has said she was told by the supplier about the results she would get and I consider it more likely than not that the supplier did discuss the potential benefits of the procedure on her appearance. However, it is difficult to base a finding of breach of contract on this alone where there is a lack of supporting evidence and no outright admission of wrongdoing by the supplier. Particularly noting where in the field of medical procedures there is usually some kind of agreement around the risks and variables, and the possible subjective factors involved in cosmetic treatments more generally.

In this case I see that TPF contacted the supplier and it has not accepted any wrongdoing – responding to say that it outlined to Miss B that the results of the cosmetic procedure are not guaranteed and may or may not meet patients expectations. It indicates that Miss B did not contact it to express her dissatisfaction with the results and at the time appeared pleased.

I have carefully considered the promotional information which Miss B was given pre-treatment but I don't think this alone is enough to demonstrate a breach of contract has occurred here. I am satisfied it shows that ultimately the aim of the procedure is to improve appearance – but I don't think it serves as a clear contractual guarantee of the results Miss B would receive.

I accept it isn't clear what actually took place in the consultation– but the difficulty here is that there isn't persuasive evidence of what was explicitly promised and what was actually received and how these might differ. In light of that, and considering the type of service in question here (taking in mind what I said earlier) it is difficult for me to say that TPF should have upheld Miss B's claim for breach of a specific term of the contract here.

Furthermore even if I were to agree that Miss B did not receive the cosmetic appearance she was expecting (and it isn't clear what results she received) this does not automatically lead to a conclusion the procedure was not carried out with reasonable care and skill according to the standards in that particular industry. There are likely to be variables which will influence the success of results from person to person (which the supplier has touched on) that are not necessarily due to wrongdoing of the supplier. It would also be difficult to come to the conclusion that reasonable skill and care was not demonstrated without some more persuasive (likely expert) evidence.

In summary and noting the complexity and possible variables I am unable to fairly say that the evidence here shows a clear breach of contract by the supplier in respect of explicit terms or the implied term regarding the manner in which the procedure was carried out. So I don't think TPF has acted unfairly in declining Miss B's claim in respect of breach of contract.

For completeness, I have also considered the possibility that TPF could have upheld the claim if there were persuasive evidence of misrepresentation by the supplier. In order to show misrepresentation there would need to be evidence the supplier had made a false statement of fact to Miss B which caused her to enter the contract. But the evidential issues around the breach of contract are similar here in respect of misrepresentation too. Overall

there is a lack of persuasive evidence of false factual claims made by the supplier either in writing or otherwise here. So I don't consider TBF acted unfairly in declining the claim in respect of misrepresentation.

For completeness, I note there has also been a suggestion that Miss B did not receive all the treatments she was promised. The supplier denies this. However, due to the lack of information about exactly what was agreed it is difficult to conclude that TBF made an error in declining the claim here.

Furthermore, it is worth noting that even if there were persuasive evidence of a breach of contract or misrepresentation by the supplier – determining fair redress would not necessarily be straightforward - noting that Miss B has explained the ongoing impact of the treatment of her quality of life and mental health. While I am sorry to hear about this our service is unable to make certain types of awards in respect of consequential loss in any event – including those for loss of amenity.

Chargeback

I know Miss B wanted TPF to look into Section 75. But for completeness I have considered chargeback as this is another way TPF might have been able to help Miss B with a dispute about a card transaction. However, it isn't guaranteed to succeed and not all circumstances will suit a chargeback.

It appears TPF didn't raise a chargeback here. However, even if it did raise a chargeback it is difficult to say it would likely have succeeded in any event considering the complex nature of the dispute, the evidential issues (as discussed above) and the apparent lack of admission by the supplier that it did anything wrong. So I don't think in not raising a chargeback TBF has made a mistake here or it is more likely than not to have caused Miss B to lose out.

In conclusion, for the reasons given above I don't think TBF has made an error in the way it handled Miss B's claim. So I am not going to uphold this complaint.

My final decision

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Miss B to accept or reject my decision before 2 November 2023.

Mark Lancod
Ombudsman