

## **The complaint**

Ms B is unhappy with how American Express Services Europe Limited (AESEL) trading as American Express ('Amex') handled a claim she made to it.

## **What happened**

The parties are familiar with the background facts of this case – so I will cover these briefly. It reflects my informal remit.

Ms B paid for cosmetic dental aligner treatment from a clinic ('the supplier') but says this has not been effective. In summary, she says her teeth have not straightened in line with the projected results.

The supplier ceased trading so Ms B approached Amex for a refund of the £654 she paid for the aligner treatment. Amex considered the claim initially as a chargeback and then under Section 75 but did not refund Ms B.

Ms B's complaint about the chargeback and Section 75 claim was not upheld. However, Amex did pay her £50 for the customer service she received during her claim.

Our investigator did not uphold the complaint and Ms B has requested a final decision.

Ms B has recently obtained a medical report which did not change the opinion of our investigator. I asked Amex if it made a difference to how it viewed the case and it said that it didn't. Therefore, I am making a final decision to resolve matters.

## **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 carefully considered the submissions of each party – however, I will only comment on the evidence I think is key to resolving this matter fairly.

I am sorry to hear Ms B is disappointed with the results of her treatment. And I am sorry to hear about the impact this dispute has had on her. However, it is important to note that Amex is not the supplier of cosmetic treatment and in deciding what is fair I am only looking at Amex's role as a provider of financial services. In that respect, I consider the card protections of chargeback and Section 75 to be particularly relevant here as they are ways Amex could have helped Ms B potentially get her money back.

I note part of Ms B's claim appears to be in relation to the ongoing detrimental impact of the treatment on the look of her teeth. I am sorry to hear about this, however, it is worth noting our service is unable to consider compensation for 'loss of amenity' in any event. And Ms B should seek independent legal advice about this aspect of her claim – it isn't something I have looked at in respect of her claim against Amex here.

## **Section 75**

Section 75 can allow Ms B to make a '*like claim*' against Amex for a breach of contract or misrepresentation by a supplier of goods or services paid for using her credit card.

There are certain technical criteria which need to be met for there to be a valid Section 75 claim. These relate to the cost of the goods or services, the parties to the transaction or the way the payment was made.

I note that Amex declined the Section 75 claim mentioning the 'debtor-creditor-supplier' relationship was not in place because of how Ms B's payment was made to the supplier through a third party. I have not focused on this as it doesn't make a difference to my outcome in any event. However, in the interest of completeness I don't agree with Amex here. It appears that the third party that Amex refers to was just processing the payment for the supplier – so I don't consider this would invalidate a Section 75 claim here.

Ms B has indicated that Amex should have done more instead of rejecting her claim based on what she calls a 'flawed application' of the law. While I acknowledge that both she and I disagree with Amex on its interpretation of the law– I don't think this in itself is something I would award compensation for, particularly noting that this area is not always straightforward.

My usual approach would be to look at the likely consequences of Amex's failure to look into the Section 75 claim in more depth and whether it should fairly refund Ms B in the circumstances. So in order to do that I have looked at whether there is persuasive evidence of a breach of contract or misrepresentation by the supplier here.

When looking at whether there is a breach of contract I consider the express terms of the contract along with any implied terms. Here the Consumer Rights Act 2015 ('CRA') implies a term into the contract that services will be carried out with reasonable '*care and skill*'.

My understanding is that Ms B received the initial aligner and retainer treatment she paid for. But the issue is with the results of said treatment - Ms B has essentially said that she did not get the results she was promised by the supplier.

My starting point here is that any medical or cosmetic procedure like this is complex. And something I don't have expertise in (nor do Amex). So it stands to reason that in many cases like this expert evidence is useful.

Ms B has submitted a report done by a dentist that she says supports her claim. I note this was obtained recently and there is an argument that it would not have been available to Amex to consider at the time it handled the claim (which is the subject matter of the complaint). There is also a contrary argument to this in respect of what Ms B would likely have provided had Amex looked into things further. However, that aside, I have considered this report carefully and do not think it makes a difference in any event. I will explain why.

I note the dentist confirms Ms B still needs further orthodontic treatment. Ms B then asks the dentist to confirm that there is very little movement in the teeth following the treatment – which the dentist responds to affirm. While it can be useful to have an expert input in a case involving a complex cosmetic treatment I must point out that this is not a highly persuasive report. It has been assessed sometime after the treatment ended, it lacks a statement of truth including the assessors credentials, and it is brief and lacks detail. In particular, it is not persuasive in:

- explaining the outcome of the treatment in the context of Ms B's treatment plan with the supplier and the content of the express contractual agreement between them (including any variables resulting from matters such as medical history)

- explaining the outcome in the context of any alleged failure by the supplier to act in a way that would usually be expected in this sort of treatment

I have considered the express terms of the contract between Ms B and the supplier in order to get further clarity on whether there is a clear breach of contract here. However, although there is no doubt that the supplier provides a 'projected' outcome I don't think there is anything I can see that would constitute an express guarantee of said outcome. The contract/consent for treatment which Ms B signed explains that despite the projection '*the final outcome of the orthodontic treatment depends on multiple factors*'. It then goes on to list things like following the instructions, medication, and medical factors like bone density. It also explains that the projection results are '*estimated*'.

And while I can understand that Ms B questions the point of treatment if it doesn't work – it would appear that in the healthcare industry these sorts of terms are not uncommon as treatment might work for some better than others. So I consider it unlikely they would be considered unfair. And while I agree with Ms B that terms can be incorporated into contracts other than by express written terms, I do not (as Ms B has suggested) consider the supplier in providing a treatment projection (even if this were the basis of Ms B purchasing the service) is sufficient in itself to establish a breach of contract in the circumstances.

That said, and as I have mentioned, the CRA still implies a term into consumer contracts for services that they will be performed with reasonable 'care and skill'. I know Ms B considers that the supplier has not acted with requisite care and skill here.

While I appreciate that Ms B has pointed out she didn't get the results she wanted it is important to note what is considered reasonable care and skill is not focused on the results achieved but the manner in which the service was carried out. There is no specific definition to assist me with what would be reasonable or unreasonable and this matter is made particularly challenging when considering the complexity and variables around cosmetic treatments.

I note Ms B has provided photos and her own testimony to support her argument – but this isn't sufficient to persuade me (as a non-expert) that there has been a breach of reasonable care and skill here. So I don't think it is something Amex would be expected to uphold the claim on alone.

I have considered the expert input Ms B has submitted – but as I have already mentioned – it doesn't go into the manner in which the treatment was carried out or provide evidence to showing that the supplier failed to exercise the reasonable care and skill expected in carrying out said treatment.

I also note that Ms B has referred to material on the website of the General Dental Council ('GDC') as to what best practice is when providing dental services remotely. But again, while I know Ms B feels strongly that the supplier was not acting in line with the guidance (such as not providing video calls) – it is difficult for a non-expert like me to conclude there was a breach of guidelines and whether it is sufficient to constitute a breach of reasonable care and skill (including what the likely consequences of this is in any event). And I note that Ms B has not produced a ruling by the GDC about the supplier or any comments by her expert to support this point.

For completeness I note Ms B has pointed out that she couldn't have any follow up treatment because the supplier went out of business. However, it appears from the terms Ms B has shown that any revisions are discretionary and based on the opinion of the supplier. So I don't think I can fairly say that this is a clear breach of contract which Amex should be liable for here.

I have also thought about whether there is persuasive evidence of a misrepresentation here. However, while Ms B has referred to certain marketing regarding customer satisfaction, I don't think there is anything that would constitute a false statement of fact. Particularly, when taking in context with the contents of the consent form signed by Ms B here.

In conclusion, I don't consider there to be persuasive evidence showing a breach of contract or misrepresentation here. So, while I am sorry to hear Ms B did not get the results she wanted – I can't fairly conclude that Amex should have upheld her claim. So I won't be directing it to refund her.

### *Chargeback and customer service*

From the information provided I am satisfied that when Ms B got in touch with Amex it was likely too late to raise a chargeback under the Amex rules (outside the 120 days from the processing date for a reason code relating to defective services). However, even if this were not the case I think a chargeback would be unlikely to have succeeded because the treatment was provided and (in respect of any reason code around quality) for similar reasons to those I have given in respect of the Section 75 claim.

However, I note that Amex did not confirm the chargeback was not going to be progressed further (as it was out of time) until sometime after Ms B requested one. I think it should have informed Ms B earlier and looked into Section 75 sooner than it did – I can see there were avoidable delays in doing so here. I can see this caused Ms B unnecessary distress and was not good customer service. I note that Amex has paid Ms B £50 compensation and it also apologised to her. And while I recognise the delays were not warranted – I also have to keep in mind that exploring a chargeback in the first instance is not necessarily bad practice in itself, along with the fact that Amex appears to have advised Ms B that the chargeback was likely out of time when she initially contacted it via the online chat. Overall, I don't think that Amex needs to fairly do more here to put right its customer service failings.

### **My final decision**

I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Ms B to accept or reject my decision before 2 May 2024.

Mark Lancod  
**Ombudsman**