

The complaint

Mr B complains that National Westminster Bank Plc (NatWest) failed to raise chargeback claims for payments he made to an online casino, preventing him from recovering them. He thinks NatWest should therefore refund him for the payments.

What happened

Around May 2021, Mr B opened an account with an online casino, R. He made a number of payments to R using his NatWest VISA debit card. He won R's jackpot, but they refused to pay out. He says they ultimately stopped responding to him and suspended his account.

On 16 October 2021, Mr B called NatWest to dispute the payments to R. He explained he had a gambling block on his account, but the payments had gone through due to R using various merchant names, and various incorrect merchant categorisation codes (MCCs). He said that was against VISA's rules – and had allowed R to circumvent the gambling block.

On 19 October 2021, Mr B confirmed 54 transactions, made between August and October 2021, which he was disputing. While they showed as going to various merchants, Mr B says the merchants were effectively acting as payment processors for R, as all the payments were loaded as credits to his account with R.

A few days later, NatWest notified Mr B it was declining his 'fraud' claim. He complained, explaining his dispute was about R using incorrect MCCs. NatWest maintained there had been no bank error. Unhappy with this response, Mr B referred the matter to our service. He explained he had spoken to VISA, who advised him NatWest should have raised chargeback claims against the merchants shown on his statements.

An investigator for our service ultimately decided not to uphold Mr B's complaint. She said that, as the payments didn't appear to go directly to R, it wasn't clear chargeback claims would have succeeded.

Mr B appealed the investigator's outcome so the case was escalated to me. Earlier in November 2023, I issued my provisional decision explaining I was minded to uphold the complaint. I proposed that NatWest should refund 70% of the value of the disputed payments, plus interest, to compensate Mr B for his loss of chance. I invited both parties to respond before I made a final decision.

Initially, Mr B said payments were missed that he thought should be included. And that he should be compensated for his time researching and bringing the complaint. But he then accepted the provisional decision. Similarly, NatWest has accepted the provisional decision. As both sides have responded, I'm now proceeding to finalise my 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.

As both parties have agreed with my provisional decision, I see no reason to depart from it. I therefore uphold this complaint.

I'll set out the reasons given in my provisional decision for arriving at this outcome. I'll additionally cover off the points I have already explained to Mr B directly, regarding his response to my provisional decision.

I have listened to the calls from October 2021 in which Mr B raised this matter with NatWest, to help me decide whether – as he alleges – it ought to have raised chargeback claims for the disputed payments.

For context, the chargeback scheme is a process for resolving settlement disputes, in line with rules set by the card scheme provider (in this case, VISA). In some circumstances, VISA's rules allow banks to claim in relation to issues between the card holder and the merchant paid.

The scheme is voluntary, so banks aren't obliged to raise claims just because the card holder has reported a dispute. But our service would consider it good practice to do so if the claim was likely to succeed.

In the call on 19 October 2021, Mr B specifically asks about raising chargeback claims due to the merchants' use of incorrect MCC codes. In line with the VISA rules, there is a chargeback claim option relating to this: VISA Dispute Condition 12.7: Invalid Data.

The rules explain disputes can be initiated under that condition if the authorisation request contained an incorrect MCC. Subject to certification that, and an explanation of why, the authorisation request would have been declined if valid data had been provided. There is nothing in the rules restricting such a claim being raised against a merchant providing gambling services. To defend such a claim, the acquirer would need to show why the dispute was invalid – such as showing the authorisation didn't contain invalid data.

The time limit for a chargeback claim under dispute condition 12.7 is 75 calendar days from the transaction date. I've checked and the earliest payment disputed on 19 October 2021 was from 9 August 2021. So Mr B notified NatWest of the dispute within the time limit.

However, from listening to the calls, I think NatWest misunderstood and mis-characterised Mr B's dispute. Based on what he said, I think it should have considered whether to raise chargeback claims for the payments. So I've considered the impact this error had on Mr B.

Our service's role is to decide what's fair and reasonable in all the circumstances of a case. That involves taking into account relevant law and regulations. In this case, I think it is appropriate to characterise Mr B's complaint to be about loss of chance – and to consider what the courts would be likely to award for this.

In line with how the courts would consider a claim for loss of chance, I am assessing whether there was a real and substantial chance that, but for NatWest's failure to understand and act on Mr B's dispute appropriately, he would have made a recovery from the merchants who the chargeback claims could have been raised against. If I find there was a substantial chance, I will assign a likelihood/percentage to that chance to determine a fair award.

I consider it clear Mr B wanted to pursue chargeback claims. And, for reasons I'll expand on below, I think there was a failure by NatWest in not putting forward his claims. I think there were reasonable prospects of success, such that it should have attempted claims in line with good industry practice. But for its failure to respond appropriately to Mr B's dispute, I am persuaded the claims would have been raised.

I don't consider the chances of the claims succeeding to be completely straightforward. There are a few reasons for this. But overall, I do think there was a real and substantial chance they would have. I'll explain why – addressing the reasons that complicate the chance of success:

- I don't have firm evidence there was a gambling block on Mr B's NatWest account at the time of the transactions. That is significant as, even if the merchants used the wrong MCCs, a claim under VISA dispute condition 12.7 would only succeed if using the correct MCC would have stopped the payment from being taken.

The payments Mr B is disputing went to merchants using the following MCCs: 7994 - Video Game Arcades; 5399 – Misc General Merchandise; 8999 – Professional Services; 5818 – Digital Goods; 5999 – Misc Specialty Retail; and 4900 – Utilities. Whereas NatWest has confirmed that, if the payments were for gambling, the merchants should have used MCC 7995. And my understanding is that, if there was a gambling block on the account at the time, payments to merchants using MCC 7995 would have been blocked.

As I don't have a record of the block, I can't be certain the payments would have been blocked if the authorisation requests had used MCC 7995. But I am persuaded of this point on balance. This is because, when Mr B spoke to NatWest at the time, he mentioned the gambling block on his account. And NatWest didn't dispute that there was one, which I expect it would have done if there wasn't. NatWest also acknowledges it may not have a record of the block due to record retention, rather than because there wasn't one.

- There is also limited evidence to show the payments Mr B has disputed were, in fact, going to R. He has provided some screenshots of his account with R, showing credits which appear to tally with the payments he is disputing. But the records are incomplete. Which does affect my judgment on whether there was a real and substantial chance of the claims succeeding.

I think the lack of information we have about this is, in part, attributable to NatWest's failings. If it had directed Mr B correctly on the processing for raising chargeback claims, I consider it likely he would have got better records. He says he was never directed to try to resolve things further with R, or to get evidence to show the payments were ultimately credited to his account – which I consider it likely NatWest would have directed him on if it had correctly considered his dispute.

On balance, I am persuaded by Mr B's consistent testimony and the detailed records he has pulled together to try to reconcile the payments shown on his statements with the partial records he has of the credits applied to his R account. These were obtained prior to R blocking his account. They suggest the payments were all ultimately processed by/on behalf of R.

- If we accept the payments did go to Mr B's gambling account with R, which I've explained I consider likely, some of the MCCs (such as the code relating to utilities) seem clearly incorrect. However, some merchants used the MCC for video game arcades and digital goods. It is less clear whether R could have been providing services that might reasonably fall within those categorisations.

That said, for similar reasons to those given above, I do consider it likely that the payments were for gambling. Mr B has been clear and consistent on this point, and the records he has provided does seem to show funds being loaded to a casino wallet. Mr B explains he was drawing on this pot to use R's online casino. Bearing in mind I've found it's likely he could have got better records but for NatWest's failure, I don't think this undermines his case for having a real and substantial chance of raising successful chargeback claims. The potential disparity between the likelihood of the claims succeeding, in line with the various MCCs used, is something I will take into account further when deciding the appropriate level of redress.

- It has been difficult to establish where R are based. My research on this isn't conclusive, but it does appear they operate from overseas. And the individual merchants paid (who I believe were acting for R) also show as operating from outside the UK. Bearing in mind the merchants will be subject to local laws, that makes it possible they may have been able to use non-gambling MCC codes – as local laws may differ in their definition of gambling and/or the requirements they place on merchants providing gambling services.

On the other hand, VISA's chargeback scheme, and its rules, are global. So it seems reasonable to conclude that, in providing gambling services, the merchants should have been using MCC 7995.

Taking all of this into account, I think Mr B's chargeback claims had a real and substantial chance of succeeding. There are reasonable grounds to think the merchants may have been using incorrect MCCs to circumvent a gambling block that would otherwise have prevented the payments from being taken.

I have therefore gone on to consider what Mr B's chances of success were, to determine what redress should be paid by NatWest to compensate him for his loss of chance due to failing to raise his claims. In line with the approach taken by the courts, I propose to calculate this on a percentage basis.

As explained above, there are several factors which lead me to conclude the chances of the claims succeeding are not 100%; there is too much uncertainty, and not enough clear and persuasive evidence. But I have also set out above the factors which persuade me there were reasonable prospects for the claims to succeed.

There is one further point I would highlight, which has a bearing on my judgment on what level of award would be fair, in addition to the points I've already laid out.

In all the circumstances, it does look credible and persuasive to me that these merchants were engaging in untoward activity.

There are many reports online of R's clients experiencing problems with their services. They also don't make it clear where they are operating from, or provide much traceable information about their operations.

For those locations which there are suggestions online that R may be operating from, I have checked their respective gambling commissions/authorities. R invariably aren't registered with them. If R were operating legitimately, it does strike me as odd that they wouldn't be more forthcoming about their operations. To my mind, that adds weight to Mr B's allegation that they are operating in a way to circumvent VISA requirements, using firms as aliases or to obscure what they are doing.

If the merchants involved in these payments are not operating within VISA's rules, that makes it less likely they would, and could, successfully defend chargeback claims against them.

On that basis, I think there are reasonable grounds to suspect the merchants may have decided to allow Mr B's chargebacks if they had been raised. Defending the claims would have risked then moving forward to the arbitration stage of the chargeback process – at which point VISA would have looked at both sides submissions and decided whether the claims should succeed.

If the merchants weren't following VISA's rules, they probably wouldn't want to draw attention to this by engaging with VISA.

When weighing all of this up, I consider it reasonable to assign an overall chance of 70% to Mr B's prospects of his 54 claims succeeding. This takes into account variations across the claims based on the particular MCCs used. But I consider it pragmatic and fair to reach an overall percentage chance to serve as the basis for calculating the redress I think NatWest should pay, to compensate Mr B for his loss of chance.

Following my provisional decision, Mr B pointed out he had told us about further payments to Red Lion. He queried whether those should be included in my award. As I have explained to him, I don't think they should be. The figure of 54 disputed payments matches the records I have from the time. It's also the figure he gave when he referred the matter to our service. That suggests the additional transactions weren't reported within the applicable time limit for the chargeback process.

I appreciate there probably were further payments to Red Lion. But on the balance of the available evidence, I'm not persuaded NatWest missed them or can be held at fault for Mr B not reporting them in time. It would be for Mr B to check and confirm the transactions he was disputing. Overall, I don't consider it likely that failings by NatWest caused a substantial loss of chance regarding any further payments.

Mr B also said he had put time and effort into pursuing his loss. While that is true, I'm not persuaded it is fair to award him additional compensation for that – bearing in mind he is being awarded for (part of) his loss, with interest. It is part and parcel of raising a dispute that it will involve some effort. But our service is available to use as a free and informal way of pursuing such matters. And there is a level of individual discretion involved regarding how much time is taken to pursue things.

Overall, I consider that directing NatWest to pay an award in line with Mr B's 70% loss of chance in relation to the 54 disputed transactions, with interest, is a fair way to resolve this complaint.

My final decision

For the reasons given above, I uphold this complaint and direct National Westminster Bank Plc to:

- Refund 70% of the value of the transactions Mr B disputed on 19 October 2021, to compensate him for his loss of chance (which NatWest has calculated to be £3,916.96); and
- Pay 8% simple interest per year on this amount, accruing from 19 October 2021 (the date of his attempted claim) to the date of settlement, to compensate Mr B for the loss of use of those funds.

National Westminster Bank Plc must pay the compensation within 28 days of the date on which we tell it Mr B accepts my final decision.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr B to accept or reject my decision before 6 December 2023.

Rachel Loughlin
Ombudsman