

The complaint

Mr O complains that American Express Services Europe Limited (AESEL) is holding him liable for payments he didn't authorise.

What happened

In late 2022, Mr O was on a night out. He believes his drink was spiked. He reports waking up in an unfamiliar house where there were women with card machines, and also says he saw someone possibly going through his wallet but didn't realise/notice he was missing any cards at that point.

When Mr O went home, he saw messages from AESEL about attempted transactions on his card. He called and was told about several transactions to a merchant, 'C', which runs an adult entertainment venue. There were also some further payments attempted that were blocked by AESEL, which is what prompted its messages. The full list of the transactions is as follows:

Time	Amount	Recipient	Successful?
04:43	£6,355	C	Yes
05:37	£8,356	C	Yes
06:30	£8,320	C	Yes
07:31	£8,390	G	No
07:32	£8,390	G	No
07:45	£8,390	G	No
07:45	£8,390	C	No
Total taken	£23,031		

Please note that, for the successful payments, I've taken the timings from the receipts I've seen from C. For the unsuccessful payments, I've relied on Mr O's timings – which I understand he got from the police. I've also relied on his submissions that three of the payments were sent to another merchant, "G", as AESEL's records only show the payment processor.

During the call, Mr O initially says he still has his AESEL card. But later in the call, he seems to check and then says he doesn't have the card. In response to AESEL reading out the first two payments, Mr O says the second payment wasn't him and C must have charged him twice.

AESEL contacted C about the dispute. They replied with invoices/receipts for the payments, along with a photograph of Mr O holding his ID, AESEL card, and a receipt for one of the transactions. AESEL held him liable for the payments.

Unhappy with this response, Mr O referred the matter to our service. He denied making any of the payments. He pointed out they occurred at a time when the venue was meant to be closed. He says he never visited the venue and the police have confirmed his mobile data, plus a statement from staff at the venue he was at previously, places him elsewhere.

Our investigator reviewed the complaint and decided not to uphold it. They didn't think Mr O had adequately accounted for his change in testimony based on what he initially told AESEL (suggesting he accepted he made the first payment) or the photograph C had provided. They considered whether the payments were unusual enough that AESEL ought to have intervened/blocked them earlier. Taking into account Mr O's general account use, they thought it had intervened at a reasonable point.

Mr O has appealed the investigator's outcome so the case has been passed to me. In summary, he denies the receipt and photograph provided by C are genuine – he thinks they have been doctored. He doesn't think the police evidence about his location has been given due weight. He also says the police told him they've received a similar report of another individual having money taken without their knowledge or under duress.

Mr O also thinks AESEL should have done more due to the "suspicious" account activity. He says the frequency, size and nature of the merchant was uncharacteristic for him. Previous large payments had been one-off payments to reputable merchants, so weren't similar.

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 decided not to uphold it. I'll explain why.

In line with the Payment Services Regulations 2017, Mr O is generally liable for payments he authorises – whereas AESEL would generally be liable for unauthorised transactions. It appears the disputed payments were properly authenticated via chip and PIN. But Mr O says that wasn't done by him, and the payments were taken without his permission.

I'm therefore considering whether Mr O consented to the payments. This has a particular meaning under the PSRs; it's not about *informed* consent. It comes down to whether Mr O (or someone acting for him) completed the agreed form and procedure for making a payment – such as entering his card into a payment terminal and typing in the PIN. If he did this, or if it was done by someone acting for him, then he would be deemed to have consented to the payment(s).

Under Section 84 of the Consumer Credit Act 1974, Mr O would also be held liable for "misuse" of his credit token (i.e. his card) if the token was acquired with his consent. So, if he agreed to give his card to someone, he would generally be liable for payments they made.

I appreciate Mr O says he didn't complete the payment steps and was never at the venue. But there are inconsistencies in what he has told us, and AESEL, over time. When he called AESEL initially, he didn't appear to dispute the first payment to C when AESEL read it out – specifying the merchant and the payment amount. It was only when it read out the second payment that he said he must have been charged *twice*. Which would suggest he did make the first payment.

I haven't seen anything from Mr O which satisfies me on why he would have said this if he didn't make any of the payments. Furthermore, I don't think what he's said/provided explains how C has a photograph of him – which, on review, I'm not persuaded has been doctored.

I'm also conscious Mr O hadn't made a chip and PIN payment on his AESEL card for almost two weeks prior. If, as he alleges, he didn't make any of these payments, I don't think we have a credible explanation for how an unauthorised party knew his PIN in order to make them without his consent.

Mr O says he never went to C's venue. And he has provided an email from the police which does suggest his phone data places him elsewhere. However, I don't think that information is conclusive. Moreover, even if he wasn't at Mr O's main venue – that doesn't mean he didn't have any dealings with them. The information I've mentioned above suggests otherwise. The location information also leaves open the possibility that Mr O completed the payment steps by entering his card and PIN from another location.

As I've touched on above, I'm not considering whether Mr O necessarily understood what he was agreeing to. I'm considering whether it's likely someone else could have completed the payment steps without his authority. Having carefully weighed up all the evidence, I'm not persuaded that's the more likely explanation. So, I think it's reasonable for AESEL to treat the payments as authorised and hold Mr O liable.

I do appreciate there is some evidence to suggest something untoward may have happened here. At the time the payments were taken, the venue the payments were sent to was meant to be closed. Yet they provided receipts from outside their licencing hours.

It does also appear Mr O didn't have his AESEL card when he got home. And there were further, high-value payment attempts – including another to C – that night. Mr O has also provided an email suggesting the police were/are looking into C – who he's told us they've received at least one other similar report about.

I do accept there is a very real possibility Mr O was tricked in some way. But if (for example) he completed the payment steps under coercion, or was tricked about the payment amount/recipient, the payments would still be deemed authorised. That also isn't the nature of the allegation he has put to us. And I do have concerns over the changes in his testimony over time – which does affect his credibility, and therefore the weight I place on what he's told us about what happened.

All of that said, as I do consider it possible that some form of scam *may* have taken place, I have thought about whether AESEL ought to have been able to prevent any fraudulent losses Mr O may have incurred. While it has a duty to promptly execute authorised payment instructions, there are circumstances when it might be appropriate for AESEL to take additional steps before processing a payment – such as when there are grounds to suspect it presents a fraud risk. That might occur when a payment is significantly unusual or uncharacteristic compared to the normal use of the account.

AESEL did identify the fourth attempted payment as a concern, and blocked Mr O's card at that point. I've considered whether it ought to have done so sooner. On balance, I'm persuaded it intervened at a reasonable point.

I understand the distinction Mr O has drawn between the previous high-value payments he has made and the disputed payments. But I do consider it reasonable that these other payments will have fed into AESEL's view of what level of spending it might expect to see from Mr O.

It could be seen as a concern that several high-value payments were taken by a merchant Mr O hadn't paid before. On the other hand, there were time gaps between the payments that went through. Whereas the next payment attempts occurred in rapid succession. And the value of the payments that went through wasn't unheard of for Mr O's account use.

Overall, I'm not persuaded the first three payments appeared significantly unusual such that AESEL is at fault for allowing them to go through. I think it seems reasonable that it didn't take action until the fourth payment.

I appreciate this outcome will be disappointing for Mr O. But in all the circumstances, I'm not persuaded there is a credible explanation for how an unauthorised person made these payments without his consent. Nor am I persuaded there are other grounds for holding AESEL liable. I'm therefore not directing AESEL to refund him.

My final decision

For the reasons given above, my final decision is that I do not uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr O to accept or reject my decision before 4 April 2024.

Rachel Loughlin
Ombudsman