

## **The complaint**

Mr G complains about how Tesco Personal Finance PLC trading as Tesco Bank ('TB') handled a claim he made to it.

## **What happened**

The parties are familiar with the background facts of this case so I will only summarise these briefly. Mr G is being represented by his wife in this dispute who also was booked on the trip with him, so references I make to Mr G are also taken to include submissions made by her on his behalf.

Mr G booked a flight and accommodation package with an agent ('the supplier') to go away with his wife. He says that the airline mistakenly denied him boarding which meant they could not go on the trip. He wants a refund for the trip and consequential losses.

Mr G approached TB for a refund and it considered the matter in respect of the chargeback scheme and Section 75 of the Consumer Credit Act 1974 ('Section 75'). However, it did not agree to refund Mr G, in summary saying it could not evidence there was a breach of contract by the supplier.

Our investigator upheld the case but TB did not agree. In summary, it says:

- the supplier's and airlines terms say that the responsibility for having the correct travel documents is with the traveller;
- Mr G has not evidenced that he had the right documents to travel and it would need to establish the exact reason he was refused boarding; and
- there simply isn't enough evidence to substantiate a breach of contract so it doesn't consider it should be liable for the cost of the holiday.

The matter was referred to me for a decision.

After receiving the case I considered the information on the file and asked Mr G additional questions and was provided with further submissions and evidence. I now consider I have sufficient information to proceed with a decision.

I issued a provisional decision on this case as follows:

### ***What I've provisionally 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 information submitted by the parties – however, I won't comment on it all. This reflects my role resolving disputes informally.*

*In considering whether TB acted fairly I am considering its role as a provider of financial services. In that respect, the card protections of chargeback and Section 75 are particularly relevant here.*

*Because I am proposing to uphold this case under Section 75 I do not consider it necessary to cover chargeback in any detail as it does not provide Mr G with additional recourse here.*

*Section 75 means that Mr G can hold TB liable for a 'like claim' he would have against a supplier for breach of contract or misrepresentation in respect of an agreement for goods or services financed by his credit card.*

*For Section 75 to apply certain criteria must be met relating to matters such as the cost of the goods or services or the nature of the parties to the agreement. In this case I consider these criteria are met so I have moved on to whether there is a likely breach of contract or misrepresentation by the supplier here.*

*I consider that The Package Travel and Linked Travel Arrangements Regulations 2018 ('PTRs') are relevant to this case. Along with the Consumer Rights Act 2015 ('CRA').*

*It is worth keeping in mind here that the Section 75 claim only applies to any breach of contract or misrepresentation in respect of the agreement financed by Mr G's credit card. So in that case it is the agreement between Mr G and the supplier. However, I note that here the trip Mr G booked using his card included a combination of both travel and accommodation elements.*

*I consider here that the supplier offered for sale and sold Mr G a package travel contract as defined by the PTRs because it combined and sold at an inclusive price a holiday consisting of at least two different types of travel services. As a result although the supplier is not an airline it is considered an 'organiser' under the PTRs as set out in the interpretation and it is liable for the performance of the whole package under Regulation 15:*

*'The organiser is liable to the traveller for the performance of the travel services included in the package travel contract, irrespective of whether those services are to be performed by the organiser or by other travel service providers'*

*Therefore, although the focus of Mr G's claim is on the actions of the airline I consider that the supplier here is responsible for any breach of contract by the airline as it is part of the performance of the holiday package. And as a result of this TB is also responsible for any breach of contract by the airline via the rights Mr G has against it under Section 75.*

*The question here is whether the airline (and therefore the supplier) is in breach of contract here. Where matters are unclear (as they are here) I decide matters on the balance of probabilities.*

*Mr G has provided a credible account of what happened and underlines that he and his wife got all the way to the gate with all the documents that they have travelled on previously (and since) with no issues yet were denied boarding as Mr G allegedly did not have all the correct documents. Mr G has explained that it meant they could not get on the flight and it ruined a birthday trip he had planned for his wife.*

*My starting point is in the absence of evidence to the contrary from TB Mr G's testimony is persuasive in convincing me that he and his wife were denied boarding at the gate and never got on the plane. Therefore, on the face of it they appear not to have benefited from the holiday booking.*

*The central question here for me is whether the denied boarding constitutes a breach of contract in the particular circumstances. TB has rightly pointed out that the supplier (and airline's) terms make it clear that the responsibility for having the correct documents lies with the passenger. And that it can refuse boarding in situations where the passenger does not appear to have the correct documents. It follows, that I don't think the situation here constitutes a breach of an express term of the contract for package travel.*

*However, I have also considered the implied term that a service must be carried out with reasonable 'care and skill' which is inserted by the CRA into consumer contracts like this one. What is reasonable care and skill is not explicitly defined by the CRA but it is usually considered to be the reasonable standard expected in a particular industry.*

*In order to determine if the supplier likely acted with reasonable care and skill I took a look at the documents which Mr G says he provided at the airport. I know that TB questions what Mr G provided – but he has been consistent about this, and in the absence of evidence from the supplier to the contrary (which I will elaborate on later) I don't think it is unreasonable to accept that he had these documents with him at the airport.*

*I looked at the documents in respect of the relevant travel guidance on the website of the European Union which Mr G provided to see if it appears that these documents would have been sufficient to travel. My initial reading of the guidance was that the residence card Mr G had would not have been sufficient to travel and he would have needed an additional EU issued visa to do so. I put this to him for a response.*

*However, Mr G came back to challenge this. He explained that because he is married to an EU citizen (and provided a marriage certificate at the airport) he should have been allowed to travel and noted that he was issued with a boarding pass at check in (as he was not able to check in online) which must show his documentation was considered sufficient. He also points out that regardless of the lack of an EU visa there are provisions in the European guidance which allow for entry in absence of this visa with a copy of a marriage certificate and his wife's EU passport.*

*So, after sharing my initial thoughts with Mr G and his response I am now left unclear about why he was denied boarding at the gate. I also note that he has highlighted he was issued a boarding pass at the check in desk. Here is usually where passports and relevant travel documents are scrutinised in detail – so this all raises significant questions about the situation that later occurred at the gate and why the airline denied him boarding. And while I consider the testimony about Mr G's other trips does not in itself prove the airline acted incorrectly it does add an additional layer of doubt in this particular situation.*

*Ultimately, I am not an expert in the relevant visa and travel requirements (and nor is TB for that matter) however, I expect that those with the authority at the airline to refuse a passenger boarding at the gate would have sufficient expertise in the matter and keep records of any reasons for passenger boarding refusal with supporting evidence in order to show that the exercise of such discretion was done with reasonable skill and care. Therefore, in deciding what is fair and reasonable here I turn to what response we have from the supplier or the airline to explain exactly what happened here and why.*

*Unfortunately there are no specific explanations given here. The supplier appears to have responded to Mr G to simply repeat its own terms, and claim it is not responsible for the policies of the airline. A response which does not take into account the CRA implied term to act with reasonable care and skill when providing a service or the supplier's liability in respect of performance of the whole package under the PTRs.*

*The airline has apparently been silent on the matter despite Mr G's and TBs efforts to get a response. I appreciate what TB is stating about its unsuccessful attempts to get further information from the supplier and the airline about the exact reason for the airline refusing boarding. However, it is ultimately responsible for the actions of the supplier under Section 75. And considering this liability, noting the consistent testimony and supporting evidence from Mr G and the lack of a credible defence put forward by the supplier to explain things I consider it fair and reasonable to conclude that TB should have upheld Mr G's claim in these circumstances.*

*I appreciate that TB might consider this unfair – and it may wish to consider its position against the supplier as a result. However, as far as Mr G's claim is concerned TB sits in the supplier's 'shoes'. And I don't think Mr G should lose out in these particular circumstances when the supplier has failed to adequately answer credible allegations that it didn't act properly.*

*So I think it fair and reasonable here that TB refund Mr G for the trip he paid for (flights and hotel cost) which I understand is £355.20, along with reasonable consequential losses.*

*I consider it fair here that the card is re-worked as if the £355.20 was refunded when TB first declined the claim. I am not clear when that was – but it appears it was passed to the Section 75 team in mid-December 2022 soon after the claim was raised by Mr G. So in the absence of any other date I think it fair to re-work from a month later (15<sup>th</sup> January 2023) and also pay 8% simple yearly out of pocket interest on any credit balance from that date onwards.*

*Mr G has claimed consequential losses which I have considered. I think some of these are a reasonably foreseeable consequence of the actions of the supplier here and on the face of it TB should pay for these. These costs are:*

- Pre-paid bus transfers at the destination – 22 Euros*
- Seat allocation cost - £36*
- Car parking at the airport - £66.73*
- Reasonable costs of getting to the airport (Mr G has estimated this at around £42.57 based on mileage to the airport and the HMRC mileage rates. This is not a science and depends on several variables including engine size but I think overall £40 is a reasonable sum here)*

*However, under Section 75 TB is not responsible for the financial loss of third parties – only Mr G. Furthermore, I am unable to direct TB to pay compensation to Mr G's partner – as Mr G is the eligible complainant here. So Mr G needs to persuasively show he is out of pocket for the things above (such as showing payments from his bank account or a joint account). I appreciate Mr G has sent in some evidence showing these costs but it isn't clear to me that he is out of pocket (I note for example the seat allocation cost was not paid on his card and some of the statements have incomplete information). If he is able to provide persuasive evidence to show it is he who has lost out in relation to the costs above I consider it fair to award these against TB along with out of pocket interest.*

*Mr G has also claimed for the cost of a meal at the airport, however, I don't think it fair to reimburse this as it is something there was still reasonable benefit from. Furthermore, I don't think claiming his wife's beauty treatment is a reasonable cost here for similar reasons and because I don't consider it a reasonably foreseeable loss.*

*Mr G has also claimed for his wife's time involved in this case. However, this is not a cost I consider reasonable to claim here – particularly as our service is free to use.*

*I note that Mr G has described the disappointment caused by not being able to go on the trip particularly for his wife who had her birthday ruined. I am very sorry to hear about this. Under Section 75 TB's liability for damages relating to distress and inconvenience are limited, and are only in respect of Mr G in any event as the debtor. However, I note that in relation to contracts for holidays it is generally accepted that 'loss of enjoyment' is a head of damages. Furthermore, I consider it clear that Mr G has been caused a degree of distress by this experience as it was a birthday surprise he had organised and participated in. It is difficult to quantify compensation for this and it is not a scientific exercise however I note that damages in respect of a spoilt holiday will generally be of a modest nature when awarded by a court. I also note that my award here is in respect of Mr G only. All things considered I think that £200 additional compensation is fair and reasonable here for TB to pay to Mr G.*

### **My provisional decision**

*I uphold this complaint and direct Tesco Personal Finance PLC trading as Tesco Bank to:*

- *Rework Mr G's card as if the £355.20 for the cost of the holiday was refunded to his card on 15<sup>th</sup> January 2023 and if the re-working results in a credit balance pay 8% simple yearly interest on this from 15<sup>th</sup> January 2023 to the date of settlement; and*
- *pay Mr G an additional £200 compensation.*

*If TB considers it should deduct tax from the interest element of my award it should provide Mr G with a certificate of tax deduction.*

I asked the parties for their comments:

TB did not add any further comment.

Mr G accepted my decision and also provided further evidence and explanation of the consequential costs incurred.

### **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.

Because neither party has disagreed with my provisional findings (above) I am not compelled to alter them. So I make my final decision on the same basis.

I note that in my provisional decision I invited Mr G to provide further submissions in respect of consequential losses to show he was out of pocket for these. I note the following:

- *Pre-paid bus transfers at the destination – 22 Euros and Seat allocation cost - £36:* Mr G has explained that his partner paid for these – but he will have to reimburse this to her. It follows that I consider it fair that on production of a receipt for the cost TB should reimburse this to him as an out of pocket expense.
- *Car parking at the airport - £66.73:* Mr G has provided proof of payment so I consider it fair that TB pay this to him.

- *Reasonable costs of getting to the airport:* I said that £40 appeared a fair sum here for fuel. Mr G has provided details of his car – and it doesn't make me think that my estimate was unfair. Mr G also agrees with this amount. I don't expect he will have fuel receipts from the time but TB should pay this in any event.

### **Putting things right**

TB should put things right in accordance with my direction below for the reasons given here (and incorporating my provisional findings).

### **My final decision**

I uphold this complaint and direct Tesco Personal Finance PLC trading as Tesco Bank to:

- Rework Mr G's card as if the £355.20 for the cost of the holiday was refunded to his card on 15<sup>th</sup> January 2023 and if this results in a credit balance pay this to Mr G.
- Reimburse Mr G for the following:
  - £40 for fuel costs;
  - £66.73 for airport parking; and
  - the cost of the seat allocation and bus transfers I have mentioned above on production of receipts for these expenses.
- pay 8% simple yearly interest on any refunds calculated from 15<sup>th</sup> January 2023 to the date of settlement; and
- pay Mr G an additional £200 compensation.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mr G to accept or reject my decision before 5 April 2024.

Mark Lancod  
**Ombudsman**