

The complaint

Mrs W complains NewDay Ltd have acted unfairly by not refunding the payment she made towards a holiday using her credit card.

What happened

On 12 May 2023 Mrs W used her NewDay credit card to purchase a package holiday, departing on 18 May 2023, at a cost of £2,597.00. She arranged this by contacting a travel agent, I'll refer to as Company A, who she made payment to for the holiday. The package holiday was provided by a separate company, I'll refer to as Company T.

As part of the booking Mrs W believed she'd be eligible for a dining package that included seven à la carte meals, however when she arrived at the hotel, she was told she wasn't entitled to this as she didn't hold the necessary Black Card.

While on holiday Mrs W raised a complaint with Company T who offered £150 compensation to apologise. Mrs W didn't accept this, saying the dining package had been a selling point for the holiday and as such Company T had mis-sold it.

Unhappy with Company T's response Mrs W contacted NewDay later the same month for assistance. NewDay first attempted what's known as a "chargeback" on 30 May 2023 to reclaim the money she'd paid. As the money had been paid to Company A it was they NewDay contacted to return the funds.

Company A disagreed with the chargeback, submitting evidence in their defence. NewDay reviewed this and decided not to pursue the chargeback any further.

NewDay has also said they considered whether they had any liabilities to Mrs W under section 75 of the Consumer Credit Act 1974 (CCA). But said the necessary requirements for section 75 hadn't been met – specifically the payment had been made to Company A, not Company T.

Mrs W complained about NewDay's decision and how they'd handled matters – saying she'd told them what had happened and had been advised to raise a chargeback for the full amount. She also said it was Company T who'd mis-sold the holiday.

NewDay reviewed matters and issued their final response on 31 August 2023. In this they apologised for the advice she'd been given, saying she should have been told to raise a partial dispute as she'd travelled on the holiday but not received the dining package. They also commented that she should have been advised to select a different dispute reason. To resolve matters NewDay paid £105 compensation.

Unhappy with their response Mrs W contacted our service.

An Investigator here reviewed matters and concluded there had been a misrepresentation by Company T. She then explained as this was a package holiday, certain regulations meant NewDay could be held responsible for those misrepresentations under section 75 of the

CCA, even though payment was made to Company A. To resolve matters our Investigator said NewDay should refund Mrs W £519.40 plus 8%, as she'd not received the dining package Company T had said she would.

Mrs W agreed, although commented that she remained unhappy NewDay had raised the dispute against the travel agent, and not Company T.

NewDay didn't accept our Investigators findings, ultimately saying the dining package Mrs W believed she was eligible for came under the heading of Guests with a Black Card – which wasn't something Mrs W had.

With no resolution the complaint was passed to me to decide.

I issued a provisional decision, explaining why I didn't intend to uphold this complaint. In this I said:

"I've considered all the available evidence and arguments to decide what's fair and reasonable in the circumstances of this complaint.

Firstly, I think it's important to set out that having looked at the description from Company T's website at the time Mrs W booked, this explained the first requirement for a guest to qualify for the dining package with seven à la carte meals was to hold a Black Card.

From what I've seen, Mrs W didn't book a room that qualified for the Black Card so it follows that she wasn't entitled to receive the dining package with seven à la carte meals, as she'd not paid for it. I've explained this in more detail below and set out what that means for Mrs W's complaint.

When a consumer approaches their credit card issuer with a problem with a purchase made using their card, there are two avenues via which the business can help.

The card issuer can try to reclaim the amount (or part of the amount) the consumer paid on their card, via the dispute resolution mechanism operated by the card scheme (Mastercard in this case), and which is often known as "chargeback". They can also consider honouring a claim under section 75 of the CCA. I will consider each of these mechanisms in turn below.

Before doing so I think it would also be helpful to explain that while I understand Mrs W says the misrepresentations in this case were made by Company T, because she made the payment to Company A they are the only organisation NewDay can make a like claim against.

Chargeback

Chargebacks are governed by rules set by the card scheme to which the consumer's card belongs – in this case that's Mastercard.

While a consumer cannot require their card issuer to attempt a chargeback, as it isn't a right, our service does consider it good practice to do so, if it is within the time limits and there is a reasonable prospect of success. I'd also expect the card issuer to conduct a chargeback correctly, in a timely manner and without making an error.

NewDay attempted a chargeback on the full amount Mrs W paid, but it was opposed by Company A – they said Mrs W had received the service paid for by travelling on the holiday. They also added that Company T had offered Mrs W £150 in compensation and as such they didn't agree the chargeback should be successful.

I've thought about whether NewDay should have taken matters forward or escalated the chargeback for Mastercard to decide. Chargebacks can only be raised for reasons specified by the card scheme. If a particular dispute doesn't fall neatly within one of those reasons, then it may not be a suitable dispute to raise via a chargeback. Having considered the reasons for which a chargeback can be raised under Mastercard's rules, I think it unlikely a full chargeback would have been successful under any reason code. That's because Mrs W went on the holiday she paid for, and while not everything was as she expected, it wouldn't be fair to receive a full refund under the chargeback process as a result.

I've also considered whether the chargeback might have been successful had NewDay initiated only a partial chargeback, as they say should have happened, but I don't think it would. I say this because as explained Mrs W didn't hold a Black Card because she didn't pay for the room type that qualified her for it. Without a Black Card she wasn't eligible for the dining package she expected. As such, I consider Mrs W received the services she paid for.

Given this, while NewDay didn't raise a partial chargeback, I don't think Mrs W lost out as a result. Because whether full or partial I don't think a chargeback would have succeeded in any case.

Section 75 of the CCA

Section 75 of the CCA allows consumers who have purchased goods or services using a credit card, to claim against their credit card issuer in respect of any breach of contract or misrepresentation by the supplier of those goods or services, so long as certain conditions are met.

One condition which needs to be met for section 75 to apply to a purchase, is the claim must relate to an item with a cash price of over £100 and no more than £30,000. The cash price here met this condition. I've noted Mrs W received a small discount when making the booking – but even considering this, it was within the boundaries. While not always necessary, the total cost of £2,597.00 was paid using Mrs W's credit card.

A further condition is that there needs to be what is known as a debtor-creditor-supplier ("DCS") agreement in place. NewDay made some comments about the DCS arrangement as Mrs W paid Company A, but the misrepresentations she was claiming were made by Company T. Our Investigator considered that, irrespective of which party had made the misrepresentation, under The Package Travel and Linked Travel Arrangement Regulations 2018, Company A could be held responsible for any misrepresentation by Company T – irrelevant of who the card payment was made to.

While I've thought about this requirement, as explained above I also need to be persuaded there has been a breach of contract or misrepresentation and in this case I don't think there has. As such I don't need to make a finding on whether there is a valid DCS agreement in place. I'll explain my reason for this in more detail below.

Has there been a breach of contract or misrepresentation?

Misrepresentation

For the purposes of this case, a misrepresentation is a false statement of fact which induces another party into a contract which leads them to suffer a loss.

Mrs W says Company T misrepresented the dining package she would receive during the holiday she purchased – and it was this dining package that was the selling point of the holiday.

As explained, I've looked at the description on Company T's website, as it was at the time Mrs W booked the holiday. This says:

"Guests with Black Card can enjoy their breakfast at [Restaurant A] or [Restaurant B] from 07.00 until 10.15 and when staying on All Inclusive are entitled to the following – 7 à la carte restaurants, for dinner, in exchange of their entitled meals in the main restaurant – upon a minimum stay of 7 nights."

Mrs W booked an All Inclusive holiday and stayed for seven nights, so considered she would be eligible for the above dining package. I've looked at the above and while Mrs W met two requirements, this wording also said the first requirement was to have a Black Card – something Mrs W didn't have because the room she booked didn't qualify for it.

While I understand Mrs W says Company T changed their wording after she complained, which I've also read and note it goes into more detail about the room type needed to qualify for a Black Card, that doesn't mean the description she read contained a false statement of fact. Which I'd need to be persuaded there had been, in order to say there had been a misrepresentation here.

For completeness I've also considered whether there had been any misrepresentation made by Company A, but I don't think there has. Mrs W told our service that to book the holiday she telephoned Company A telling them she'd received a recommendation for the hotel. She went on to explain that the agent from Company A looked at the room options and went through the information on Company T's website. From what Mrs W says, Company A didn't do anything that induced Mrs W into purchasing the holiday, apart from reading information from Company T's website. So I can't say any misrepresentation, for the purpose of section 75, was made by Company A either.

As there is nothing I've seen which would represent a false statement by either party, I'm not able to conclude there has been a misrepresentation in this case, for the purposes of section 75.

Breach of contract

I've also gone on to consider whether there has been a breach of contract in this case.

A breach of contract occurs when one party to the contract fails to discharge its obligation to the other. These obligations may come about as a result of the express term of the contract, or because of terms implied by legislation.

Having reviewed the terms and conditions between Mrs W and both Company A and T, I've seen nothing to say the dining package Mrs W was expecting would be included.

As such, I'm unable to conclude that either Company A or Company T breached its contract with Mrs W by failing to provide the dining package she was expecting.

Ultimately as Mrs W received everything she paid for; I'm satisfied there hasn't been a breach of contract in this case.

Customer service

Mrs W has said her complaint for our service is that instead of NewDay making the claim against Company T, who she considered misrepresented things, they made the claim against Company A. While I understand why Mrs W is concerned about this, I've explained above the requirements in place for chargebacks and section 75 claims and why NewDay were only able to claim against Company A. So I don't consider they did anything wrong here.

NewDay have however paid Mrs W £105 in respect of customer service failings – specifically they say this was for advice they gave her around raising a chargeback. As I've explained above I don't think raising a partial chargeback or using an alternative code would have changed the outcome here. So I consider this is a fair resolution to address the fact that NewDay say it should have done more.

I appreciate this will come as a disappointment to Mrs W, but I hope I've helped explain why in this case it's not been possible to say there has been a misrepresentation or a breach of contract, so I won't be upholding this complaint.”

I invited both parties to respond with any further points or evidence they wanted me to take into account before I made a final decision.

NewDay acknowledged what I'd said but didn't make any further comments.

Mrs W also responded – she didn't agree with what I'd said and reiterated her concerns that NewDay had made errors. She said the original advert on Company T's website hadn't been considered as well as raising some additional points. In summary she said:

- The original advert didn't include details of the room type needed to qualify for the Black Card.
- NewDay didn't submit Mrs W's claim correctly, or provide details on how claims are submitted. Had they done so, she would have been able to deal with this matter through Trading Standards.

Overall Mrs W says NewDay should refund a large percentage of her holiday cost as a result of their mistake, which has caused her ongoing stress.

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 reached the same outcome as set out in my provisional decision.

I'm sorry to see Mrs W didn't feel the original advert on Company T's website had been considered. However, in my provisional decision I set out the wording they'd used and explained that while Mrs W had met two conditions required for the dining package she expected – booking All Inclusive and staying for seven nights – she didn't meet the first condition, which was to hold a Black Card.

I can appreciate it will have been frustrating for Mrs W not to receive the dining package she expected, and that Company T has since changed their advert to include the room types required to qualify for the Black Card. However, as I explained in my provisional decision, although the description has since been expanded – it doesn't mean the original description was incorrect or contained a false statement of fact.

The room type Mrs W booked didn't qualify her for the Black Card which meant she wasn't eligible for the seven à la carte meal dining package. The description on the website stated a Black Card was required to qualify and I've not seen anything to contradict this or say she was eligible for either item, based on the booking she made. As such, I can't say there has been any misrepresentation or breach of contract by either Company A or Company T.

Turning now to the errors Mrs W says NewDay made and the impact this has had. While NewDay say they should have advised Mrs W to raise a partial chargeback or use an alternative reason code, I explained in my provisional decision why I didn't think these would have impacted the outcome for Mrs W. I said that whether full or partial I don't think a chargeback would have succeeded in any case.

Mrs W also says NewDay didn't provide details on how claims are submitted. I've considered this, but I don't think that would have resulted in a different outcome either. I say that because NewDay exhausted both mechanisms available to a customer when they use their credit card – Chargeback and Section 75. Neither of these were successful.

Mrs W says she could have dealt with this matter through Trading Standards had she been given full details on how claims are submitted - but I don't agree this was NewDay's responsibility. As explained above, NewDay needed to ensure they'd exhausted the mechanisms a customer can use to make a claim via their card provider, and they've done that here. It isn't for NewDay to help Mrs W make claims through other channels. Should she wish to contact Trading Standards about this she's able to do so directly.

My final decision

For the reasons explained above, I don't uphold this complaint.

Under the rules of the Financial Ombudsman Service, I'm required to ask Mrs W to accept or reject my decision before 31 July 2024.

Victoria Cheyne
Ombudsman