An tOmbudsman Seirbhísí Airgeadais agus Pinsean
Financial Services and Pensions Ombudsman

Decision Ref:	2019-0390
Sector:	Banking
Product / Service:	Cheques
Conduct(s) complained of:	Handling of fraudulent transactions Complaint handling (Consumer Protection Code) Failure to provide adequate security measures Maladministration
Outcome:	Substantially upheld

LEGALLY BINDING DECISION
OF THE FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

Background

This complaint concerns the Provider's administration of an account held by the Complainant, who was born in 2003. The Provider is a Credit Union.

The Complainant's Case

The Complainant's mother has been authorised to make this complaint on behalf of the Complainant.

On two occasions in November 2015 and April 2016, transactions were effected on the Complainant's account by the Complainant's father.

The Complainant has taken issue with these transactions on a number of grounds. Specifically, it is submitted that the Complainant's father should not have been permitted to effect any transactions; that the Complainant's father should not have been permitted to withdraw money from the account; that the Complainant's father should not have been given a receipt for the transactions which showed the account's opening and closing balance.

It is also submitted that when responding to this complaint, the Provider failed to disclose a potential conflict of interest in that a number of the Provider's board of directors are known to the Complainant's father (the third party who effected the transactions that have given rise to this complaint).

The Complainant seeks the following:

- A formal decision on the legislative breaches that have occurred on the account;
- A copy of correspondence from the Revenue Commissioners to the Provider regarding the transactions.

The Complainant also contends that these events have caused him a lot of distress.

The Provider's Case

The Provider initially accepted that it should not have permitted a third party (the Complainant's father) to effect withdrawals on the Complainant's account. It later changed its position in this regard. It has stated that it refunded the disputed withdrawals promptly when notified of them.

It contends that matters have been complicated by virtue of the fact that the Complainant's mother lodged the initial complaint, but was not understood, at that time, to be an authorised person for the account.

It believes that elements of the complaint are vexatious, and it submits that it is caught in a dispute between the Complainant's mother and the Complainant's father for which it can have no responsibility other than having refunded the disputed withdrawals.

It states that it promptly refunded the disputed withdrawals when notified of them, and provided its staff with appropriate training. The Provider does not see what more it could have done to rectify its error.

Decision

During the investigation of this complaint by this Office, the Provider was requested to supply its written response to the complaint and to supply all relevant documents and information. The Provider responded in writing to the complaint and supplied a number of items in evidence. The Complainant was given the opportunity to see the Provider's response and the evidence supplied by the Provider. A full exchange of documentation and evidence took place between the parties.

In arriving at my Legally Binding Decision I have carefully considered the evidence and submissions put forward by the parties to the complaint.

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Having reviewed and considered the submissions made by the parties to this complaint, I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve any such conflict.

I am also satisfied that the submissions and evidence furnished were sufficient to enable a Legally Binding Decision to be made in this complaint without the necessity for holding an Oral Hearing.

The Provider, in its post Preliminary Decision submission of 17 May 2019 states:

> "*The Preliminary Decision states that 'I am satisfied that the submissions and evidence furnished do not disclose a conflict of fact …"*
>
> "*The Complainant states that a withdrawal was made. We do not agree with this*; *a cheque was partly cashed and partly lodged. There was no withdrawal on the account. At the end of the transaction the account balance was greater by the exact amount that the Complainant's father wished to lodge*".

I note the Provider is selectively quoting from my Preliminary Decision in this respect. What I stated was "*I am satisfied that the submissions and evidence furnished did not disclose a conflict of fact such as would require the holding of an Oral Hearing to resolve such conflict".* There is no doubt that there is a conflict in relation to this complaint. The point I was making both in my Preliminary Decision and in this Legally Binding Decision is that I did not see any need for an Oral Hearing to resolve those conflicts of facts because I have sufficient submissions, documentation and evidence to arrive at a Decision.

A Preliminary Decision was issued to the parties 1 May 2019, outlining the preliminary determination of this office in relation to the complaint. The parties were advised on that date, that certain limited submissions could then be made within a period of 15 working days, and in the absence of such submissions from either or both of the parties, within that period, a Legally Binding Decision would be issued to the parties, on the same terms as the Preliminary Decision, in order to conclude the matter.

Following the issue of my Preliminary Decision, the parties made the following submissions:

1. The Provider's submission to this Office dated 17 May 2019.

2. The Complainant's submission to this Office dated 31 May 2019.

3. The Provider's submission to this Office dated 15 June 2019.

4. The Complainant's submission to this Office dated 1 July 2019.

All of the above submissions were exchanged between the parties.

Having considered these additional submissions and all of the submissions and evidence furnished to this Office, I set out below my final determination.

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With reference to the potential breaches of the Data Protection Act, ***Section 53*** of the ***Financial Services and Pensions Ombudsman Act 2017*** sets out at ***50(3) (c)***:

> "*The Ombudsman shall not investigate or make a decision on a complaint where,*
>
> *(c) the complaint relates to a matter that is within the jurisdiction of … an alternative suitable forum or tribunal".*

The aspects of the complaints which relate to inappropriate disclosure of personal data are more suitable for the Office of the Data Protection Commissioner, therefore they do not form part of this investigation or adjudication.

Insofar as the Complainant alleges breaches of the Credit Union Acts and the Irish League of Credit Union Regulations, there is a more directly applicable obligation on the Provider which the conduct complained of falls under, so it is not necessary for me to consider overarching statutory obligations.

Correspondence from the Revenue Commissioners to the Provider, as requested by the Complainant, are a matter between the Revenue Commissioners and the Provider. Therefore, this matter does not form part of this investigation and adjudication.

It would be useful at this stage if I set out a chronology of events in relation to this complaint.

It should be noted that the person who mainly dealt with this complaint seems to be an external contractor engaged by the Provider. In his interaction with this Office he operated under a number of titles including Compliance and Risk Officer, Complaints Manager and CEO of a third party company.

As he was at all times operating on behalf of the Provider and is therefore responsible for its actions, I will refer to him as an "agent of the Provider".

On 14 October 2016, the account holders' mother wrote to the agent of the Provider stating that she was particularly concerned about two transactions relating to one on her son's account and one on her daughter's account that she had only recently become aware of and which had occurred almost a year earlier on 5 November 2015. She set out in considerable detail a list of fourteen queries in relation to these transactions which she required answers to.

On 4 November 2016, the account holders' mother again wrote to the agent of the Provider referring to her correspondence of 14 October 2016 in relation to a number of concerns that she had submitted relating to her son and daughter's accounts, explaining that she was extremely annoyed that she had not received an acknowledgement of that letter or any response to her concerns.

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The account holders' mother submitted a complaint to the then Financial Services Ombudsman (FSO). In an e-mail to the FSO dated 29 November 2016 at 15:59 the agent of the Provider stated "*as stated in the telephone call the Credit Union fully accepts that there was an error and that [account holders' father] should not have had access to the portion of funds accounts. However the accounts have now been fully debited to the correct amounts. Staff have been re-trained on the procedure*".

By e-mail on 9 May 2017 at 14:12, the agent of the Provider wrote to this Office stating:

> "*Further to our telephone conversation last week I can confirm that the Credit Union's position on the above dispute is that [account holders' mother] does not have authority to make a complaint as she is not authorised on the account and the children signed to open the account. We received a further complaint from [account holders' mother] on 24 April regarding the accounts that we have not acknowledged as she is not authorised on the accounts. The Credit Union is being placed in the middle of a domestic dispute by both parents, but we cannot disclose information or act on the parents' instructions.*
>
> *As such, we are seeking that the FSO direct that [the account holders' mother] cease making complaints on behalf of her children. I would further like to note that any issue with the children's accounts have been fully remediated and in our opinion the case is closed*".

By letter dated 12 July 2017, this Office wrote to the agent of the Provider stating "*this Office understands that the children referred to in the said e-mail are currently aged 15 and 13 years old respectively. As neither of the children has attained the age of majority, I would be grateful if you could confirm the basis upon which the Provider has sought to maintain this position. If the Provider maintains that [the account holders' mother] does not have authority to make a complaint in relation to these accounts, please explain in detail who the appropriate Complainant is, bearing in mind the current ages of both children*".

The Provider was asked in that correspondence when replying to provide a copy of the Provider's internal processes and protocols surrounding the opening of accounts in the names of minor children, both (i) at the time when these accounts were opened, and (ii) currently in operation by the Provider. A follow-up reminder was sent by this Office to the agent of the Provider on 1 August 2017.

As pointed out above, some of the correspondence received on behalf of the Provider was received from the Complaints Manager, some from the Compliance Manager, and also from a person described as the Chief Executive Officer of a third party company. Some of this correspondence was received from addresses at the Provider's and others at addresses of the third party company. However, all were signed on behalf of the same individual, irrespective of the various titles or e-mail addresses used.

In an e-mail received from the agent of the Provider dated 8 August 2017 at 15:15, it stated among other things:

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"As both minors signed and opened their accounts no one else can have access to this account, including the making of complaints without the members' explicit consent.

The Credit Union's complaints procedure is silent to who can make a complaint and only states 'a member can make a complaint'. If the minor had signed access or authority over to their parent, then the parent can make a complaint on their behalf. But as this has not happened, it would be a breach of the Credit Union Act and Data Protection legislation for the Credit Union to proceed with the complaint.

I attach our updated minor policy which was have now sent to every minor member.

Please note that this is only in reference to the second and third complaints. The original complaint, the Credit Union immediately rectified the matter and placed the minors' accounts back to where they should have been."

On 18 August 2017, this Office wrote to the mother of the account holders stating:

"Given the confirmation that the children hold their own signing authority, and to avoid any further difficulty, I am enclosing two new Complaint Forms, which can be completed, identifying [account holder 1] as the Complainant for one complaint and [account holder 2] for the other. It is however of course open to each of the children to appoint you [on Page 2] as their representative for each of their complaints.

Once the Forms are fully completed, each of your children should then sign their own Complaint Form. Upon receipt of these new completed Complaint Forms, we will then arrange to take matters from there".

On 31 August 2017, a new Complaint Form was received (dated 29 August 2017) in respect of [account holder] nominating his mother as his representative in order to maintain the complaint before this Office.

On 1 September 2017, this Office wrote to the agent of the Provider stating:

"To progress matters, I am now attaching for your attention newly completed Complaint Form signed by [account holder]. You will note that he is represented in this matter by [his mother].

It is open to any individual seeking to make a complaint to this Office to be represented by a professional person or by a family member or a trusted friend.

Accordingly, in circumstances where [the account holder himself] now seeks to maintain the complaint, I would be grateful if you would confirm by return that the Credit Union will cooperate with the investigation of this Office by furnishing the details and documents requested in the letter sent by this Office dated 25 April 2017, insofar as that letter pertains to the account of [account holder]."

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On 19 September 2017, a reminder issued from this Office to the agent of the Provider seeking the information.

On 24 October 2017 by e-mail at 14:19, the agent of the Provider wrote as follows:

> "*In the Credit Union's opinion, it cannot respond to the FSO's request to provide information as the complaint is a new complaint and therefore should be brought back to the Credit Union as the new complaint did not exhaust the Credit Union's complaint process as they never brought a complaint.*
>
> *It is the Credit Union's opinion that the FSO does not have jurisdiction over this matter as the Complainant did not bring a complaint to the Credit Union.*
>
> *It is the Credit Union's opinion that the FSO should close the case brought by the mother of the Complainants and direct the Complainants to bring a fresh complaint to the Credit Union to allow the Credit Union deal with the complaint*".

By letter dated 26 January 2018, this Office wrote to the agent of the Provider outlining the powers of the Ombudsman in relation to the investigation of a complaint. It was pointed out very clearly that this Office had jurisdiction to deal with the complaint under the ***Financial Services and Pensions Ombudsman Act 2017.*** It also pointed out the powers of the Ombudsman under ***Section 59*** of the ***Financial Services and Pensions Ombudsman Act 2017***.

On 14 February 2018, I wrote to the agent of the Provider informing him of my intention to commence proceedings against the Provider pursuant to ***Section 59*** of the ***Financial Services and Pensions Ombudsman Act 2017*** in relation to obstructing the work of this Office.

On 27 February 2018, I informed the agent of the Provider that the file had been passed to external lawyers to proceed by way of application to the Court under ***Section 59*** in relation to obstruction.

By e-mail on 27 February 2018 at 10:15, the agent of the Provider stated "*we are in the process of gathering all information requested*".

In March 2018, the Provider began engaging with this Office in relation to responding to the issues raised in the complaint.

In an e-mail to this Office dated 27 March 2018 at 16:44, among other things, the agent of the Provider stated "*it was an error that was rectified immediately when brought to the Credit Union's attention. Does this form part of the complaint as what more could have been done by the CU?*"

On 10 April 2018, this Office received an e-mail from the agent of the Provider informing that "*all of that documentation*" [the Provider's response to the complaint] *had been posted by the Provider to this Office*".

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This Office e-mailed the Provider on 17 April 2018 advising that no documentation had been received and requesting that the Provider arrange to deliver a copy of the formal response in duplicate **by way of courier** without further delay.

On 2 May 2018, this Office wrote to the agent of the Provider once again informing that the information had not been received and pointing out that it was now the intention of this Office to proceed to seek an Order from the Court pursuant to ***Section 59*** of the ***Financial Services and Pensions Ombudsman Act 2017*** for obstruction of the work of this Office.

On 3 May 2018, this Office received the Provider's response to the complaint.

The Complainant has an account with the Provider. The Provider has stated in its responses to this Office that no other person has authority on the account. This would be evident from the account mandate (or other account opening documentation).

The Provider's policies (and the account mandate or terms and conditions) provide for what would be the ordinary arrangements for account lodgements and withdrawals, to the extent that anyone can lodge funds to an account, but only authorised signatories can make withdrawals.

According to the Provider's current policies, when funds are lodged by a person other than an authorised person, the lodgement docket / receipt should be posted to the accountholder.

I note the Provider states, in its post Preliminary Decision submission, that this policy was not in place when the incidents complained of occurred.

The following transactions are cited by the Complainant in relation to his account, which were carried out by a person other than the Complainant – that is, not by an authorised person for the account:

Date	*Transaction type*	*Amount (€)*
5/11/15	Cheque lodgement	2,019.17
5/11/15	Withdrawal	800
29/4/16	Cheque lodgement	667.05

(*Face/Actual Value of the cheque was €1,334.11)*

As set out above, on 5 November 2015 the third party (the Complainant's father) lodged the full value of a cheque (albeit one not made out in the complete name of the Complainant) to the Complainant's account, but then withdrew €800 from the account at the same time. It is not disputed that it is permissible for a third party to lodge money to an account, but not to make a withdrawal.

On the second occasion, a cheque was made out in the family name of the Complainant, but with a different initial for the first name. However, the proceeds of the cheque were lodged

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in two equal amounts between the Complainant's account and an account in his sister's name.

As is evident from the correspondence from the Provider, set out above, the Provider initially accepted the withdrawal should not have been permitted nor that the receipt for the transaction should have been given to the Complainant's father. However, following the issue of my Preliminary Decision, I note the Provider changed its stance in this regard.

The Provider, in its post Preliminary Decision submission of 17 May 2019, states that:

> "*The Complainant's father told its teller that his son sold some calves and that he wished to lodge part of the money and use the balance to purchase young calves*".

It goes on to draw the following analogy:

> If a member produced a €50 note and wished to lodge €30, we would take the €50 and give them €20 change. The same principle applies to the request to only lodge part of the cheque; we took the amount they wished to lodge and we gave the change to the member.
>
> The language used of "*lodge and withdraw*" is just how the system processes the transaction. This was not a withdrawal.

In its post Preliminary Decision submission of 17 May 2019, the Provider also states:

> "*The Preliminary Decision states that '… at no stage has the Provider offered an apology … nor made any gesture of goodwill'. It is our view that the instruction received was executed correctly and when the amendment/clarification of the instruction was received it was also executed. The Complainant accepts that the balance on the account is correct*".

In that same submission, the Provider also states:

> "*The Preliminary Decision states that 'I have also taken into account the fact that the Provider admitted its error but that matters were somewhat complicated by the fact that the original complaint was not made by the account holder so the Provider was initially unsure what information it could and could not share*'.
>
> *We have not admitted an error. We have accepted that there was an error by the Complainant's father in his instruction when lodging his son's cheque. We also accept that this error (by the Complainant's father) was corrected when the Complainant's father returned and issued a further instruction. When the parent attended at the counter with an instruction to make a lodgment on behalf of the child, we took that instruction at face value, in line with our practice at the time.*

These statements directly conflict with the statements and evidence put forward by the Provider prior to the issue of my Preliminary Decision.

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In its post Preliminary Decision submission, the Provider also states:

> *"In relation to the statement 'the original complaint was not made by the account holder, the Provider was initially unsure what information it could and should not share' this was taken very seriously and it was considered that under no circumstances could we correspond with someone who did not have authority in relation to a matter that has become the subject of a complaint".*

Even if I accept this to be the case, it does not explain the Provider's failure to engage with this Office until I indicated my intention to institute legal proceedings for obstruction of the work of this Office. Furthermore, there was nothing to prohibit the Provider from writing to the Complainant's mother to inform her of its stance.

In relation to the alleged failure to disclose an alleged conflict of interest, I am conscious that credit unions serve relatively small communities in many cases and it is likely that members of the board would be known to parties involved in a dispute.

In its post Preliminary Decision submission of 17 May 2019, the Provider states:

> "*We have identified the director that we believe the Complainant is referring to in relation to the alleged conflict of interest. We wish to confirm that the director in question had no part to play in dealing with the complaint. However, we also wish to draw your attention to the following extract from the policy*:
>
> > *The Credit Union recognises that the term 'conflict of interest' refers to a situation in which the financial or other personal considerations may compromise, or have the appearance of compromising a director or employee's professional judgment in professional activities. The bias such a conflict could conceivably impart may inappropriately affect the goals and/or the high ethical standards to which the CREDIT UNION aspires*.
>
> *There was no "financial or other personal considerations" which would compromise the exercise of professional judgment in this case".*

There is no evidence before me that this complaint has been dealt with in a biased manner – there is no corroboration that the Provider's action was somehow tainted by bias.

I note that the conduct complained of took place on two occasions. However, the second instance, in April 2016, took place before the complaint was made in November. Therefore, I do not consider that the Provider has repeated its mistake after it had become aware of it at the time of the second transaction.

However, I also note from the Final Response Letter and in subsequent correspondence that at no stage has the provider offered an apology to those affected by its admitted error, nor

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made any gesture of goodwill beyond returning the balance of the account to the position it would have been in, had the Provider's error not occurred.

In fact, I note that the Provider's attitude became more entrenched as time went on.

Having initially accepted that it made an error, it has recoiled from that position and now seems to suggest it has not made any error.

I note the Provider, in its post Preliminary Decision submission of 17 May 2019, states:

> "*We take your point in relation to the making of a gesture to the Complainant and we would be happy to consider this in view of the time and annoyance that they [Complainants] have endured through this process. If your decision was reconsidered we would be happy to make the financial gesture to which you refer".*

I believe the Provider's handling of the complaint leaves a lot to be desired. A lot of delay and inconvenience could have been avoided if it had engaged reasonably with the Complainant or with this Office.

In my Preliminary Decision I pointed out that the Provider had not acted in accordance with the Consumer Protection Code (CPC). The Provider, in its submission of 17 May, points out that the CPC does not apply to savings and loan products from credit unions. The Provider is correct in this regard.

The Complainant makes reference to numerous unanswered letters and telephone calls in the submissions to this Office. The Provider has not given satisfactory explanations for those delays and omissions. This Office has experienced considerable difficulty in obtaining timely responses to requests for information and clarification from the Provider. This is most unacceptable.

Notwithstanding that the CPC does not apply, it would be good practice for the Provider to respond to correspondence and phonecalls. Further, the Provider has a statutory duty to provide information and evidence to this Office.

While I accept that I have not been provided with evidence of a conflict between the Provider and the consumer, in this case the account holder, I would have expected the Provider to address the matter in its response to the Complainant and this Office prior to me issuing my Preliminary Decision. The conflict if any, may have been with a third party. Nevertheless, the provision of the Provider's policy and evidence of how it had been considered in this case should have been supplied to this Office with the other material requested as part of the investigation.

The Provider acted in breach of the account mandate in permitting an unauthorised third party to withdraw funds from the account. Furthermore, the Provider undoubtedly acted in error by furnishing the transaction receipts, with the account balance showing, to the unauthorised third party.

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While the Provider refunded the monies promptly, I am not satisfied that a simple refund went far enough.

I have taken into account the fact that permitting a withdrawal from an account by an unauthorised third party constitutes a fundamental breach of the account mandate under the terms and conditions of the Provider.

In my Preliminary Decision I had taken into account the fact that the Provider admitted its error but that matters were somewhat complicated by the fact that the original complaint was not made by the account holder, so the Provider was initially unsure what information it could and could not share.

It is very disappointing that since I issued my Preliminary Decision, the Provider has recoiled from its acceptance of its errors and seeks to argue it has no case to answer.

For the reasons set out above, I substantially uphold this complaint and direct the Provider to pay a sum of €3,000 in compensation to the Complainant.

Conclusion

My Decision pursuant to ***Section 60(1)*** of the ***Financial Services and Pensions Ombudsman Act 2017***, is that this complaint is substantially upheld, on the grounds prescribed in ***Section 60(2) (b), f) and (g).***

Pursuant to ***Section 60(4) and Section 60 (6)*** of the ***Financial Services and Pensions Ombudsman Act 2017,*** I direct the Respondent Provider to make a compensatory payment to the Complainant in the sum of €3,000, to an account of the Complainant's choosing, within a period of 35 days of the nomination of account details by the Complainant to the Provider.

I also direct that interest is to be paid by the Provider on the said compensatory payment, at the rate referred to in ***Section 22*** of the ***Courts Act 1981***, if the amount is not paid to the said account, within that period.

The Provider is also required to comply with ***Section 60(8)(b)*** of the ***Financial Services and Pensions Ombudsman Act 2017.***

The above Decision is legally binding on the parties, subject only to an appeal to the High Court not later than 35 days after the date of notification of this Decision.

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FINANCIAL SERVICES AND PENSIONS OMBUDSMAN

15 November 2019

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Pursuant to *Section 62* of the *Financial Services and Pensions Ombudsman Act 2017*, the Financial Services and Pensions Ombudsman will publish legally binding decisions in relation to complaints concerning financial service providers in such a manner that—

(a) ensures that—

(i) a complainant shall not be identified by name, address or otherwise,

(ii) a provider shall not be identified by name or address,

and

(b) ensures compliance with the Data Protection Regulation and the Data Protection Act 2018.