

Decision concerning the European Commission's refusal to grant a 'double dependent child allowance' to a staff member with a child with a disability (case 535/2021/VS)

Decision

Case 535/2021/VS - Opened on 21/05/2021 - Decision on 23/02/2023 - Institution concerned European Commission (Solution partly achieved) |

The case concerned the refusal by the European Commission to grant a staff member with a child with a disability a 'double dependent child allowance', which is provided for under the EU Staff Regulations for assisting with the care of children with disabilities. The Commission based its decision on internal rules agreed by the EU administration concerning the allowance, according to which children whose disabilities are deemed to be below a certain threshold are not considered eligible.

The Ombudsman took the view that using thresholds on the degree of disability to exclude certain children with disabilities automatically is at odds with the relevant provision in the Staff Regulations. The allowance is intended to cover cases involving 'heavy expenditure', and the Staff Regulations make no reference to the degree of disability. In addition, while setting thresholds on the degree of disability to determine eligibility for financial support may make matters more straightforward and predictable from an administrative perspective, it seems to be at odds with the EU administration's obligations under the UN Convention on the Rights of Persons with Disabilities (UN CRPD).

In the course of the inquiry, the Ombudsman made a solution proposal to the Commission that it initiate the process to review the applicable rules, which will involve the other EU institutions. She also urged the Commission to reassess the complainant's request for the double dependent child allowance, taking into account the above finding, that is, not rejecting it solely because of the degree of disability that his child has been deemed to have. As the process to revise the applicable rules may take some time, and to guarantee equal treatment, the Ombudsman also urged the Commission to take this inquiry into account when considering all pending and future requests for the double dependent child allowance. This implies assessing each application for the double dependent child allowance on a case-by-case basis, and not excluding any applications merely because the child's disability is considered to be below a certain threshold.

In response to the solution proposal, the Commission has initiated a process to review the rules



setting out the threshold approach, which could lead to their revision. The Ombudsman welcomes that the Commission has acted on this aspect of her solution proposal.

However, the Commission also stated that it would await the outcome of this process before reassessing the complainant's request or other requests. Given that this may take some time, and given the findings of this inquiry, the Ombudsman remains dissatisfied on this aspect of the case. She asks the Commission once again to consider applying the rules more flexibly for requests from now on. The Ombudsman remains convinced that the rules in question should have been revised much sooner to give effect to the commitments the EU signed up to. The Ombudsman therefore asks the Commission to follow up within three months and intends to revisit the matter if the outcome of the revision is not appropriate or is taking too long. The Ombudsman will also draw the attention of the other institutions to her findings.

Background to the complaint

1. The complainant is a staff member of the European Commission who has a child with a disability. In September 2018, he asked the Commission to grant him a 'double dependent child allowance', which is an allowance foreseen under the Staff Regulations [1] for assisting in the care of children with disabilities involving heavy expenditure. He stated that his child undergoes daily physiotherapy, which is performed by the child's mother, who is specifically trained to provide this type of care.

2. The Commission rejected the request, and the complainant appealed by submitting a complaint under Article 90(2) of the Staff Regulations. The Commission dismissed the complainant's complaint. In its decision, the Commission argued that the degree of the child's disability is below the threshold (20%) set out in the EU administration's rules on this type of allowance (hereafter Conclusion 177/87) [2]. In addition, it said that the costs the complainant had claimed were "*only hypothetical*" and did not represent specific costs related to the nature of the disability.

The inquiry

3. The Ombudsman opened an inquiry and set out a series of questions to the Commission on how it had assessed the matter.

4. In the course of the inquiry, the Ombudsman received the reply of the Commission and, subsequently, the comments of the complainant in response to the Commission's reply.

Arguments presented to the Ombudsman



By the complainant

5. The complainant said that the threshold agreed by the EU administration should be considered as a guideline and cannot be interpreted in a manner that conflicts with overarching rules on the rights of persons with disabilities, for example the Charter of Fundamental Rights. All children with disabilities, irrespective of the percentage of their disability, should be covered by the double dependent child allowance.

6. The complainant stated that, while the approach agreed by the EU administration does not explicitly include provisions for children whose disability is less than 20%, it also does not state that such children should be excluded from receiving the double dependent child allowance. The complainant pointed out that the double dependent child allowance set out under the Staff Regulations is aimed at assisting families facing 'heavy expenditure' for children with disabilities, regardless of the percentage of their disability. As such, the agreed approach should also provide for granting the allowance in cases involving heavy expenditure for children below the 20% disability threshold.

7. The complainant considers that care and treatment provided by parents has 'pecuniary value'. While the care does not involve a direct cost that has to be paid by the family, there is clearly a value to the physiotherapy, which would otherwise have to be performed by a trained physiotherapist, and which has resource implications for the child's mother, who has been trained to provide the care. The pecuniary value of family care has been recognised in decisions of the European Ombudsman [3] and the clarifications provided by the Commission in the course of the inquiry.

By the Commission

8. The Commission rejected the application for the allowance because the degree of the child's disability was lower than 20%.

9. The Commission stated that it normally does take into account whether there is a pecuniary value to the care or treatment provided by parents. In such cases, the Commission's 'Medical Officer' would need to confirm that the care of a parent is linked and relevant to the nature of the disability. The Commission would then calculate the average cost of such a treatment.

10. The Commission would agree to calculate the costs in the complainant's case on the basis of an estimate from a professional, including an indication of a number of sessions prescribed by the doctor responsible for the child's treatment and an opinion from the Medical Officer confirming the necessity of the therapy in response to the disability.

The Ombudsman's proposal for a solution

11. In June 2022, the Ombudsman sent a solution proposal to the Commission. While



acknowledging that the Commission followed the approach set out in Conclusion 177/87, the Ombudsman expressed the view that this approach appears to be at odds with the provisions in the Staff Regulations that establish the double dependent child allowance.

12. The Ombudsman reminded the Commission that the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in community life is defined in the Charter of Fundamental Rights [4] and the UN Convention on the Rights of Persons with Disabilities (CRPD), to which the EU is a party [5]. The Ombudsman has previously taken the view that the double dependent child allowance serves precisely the purpose of giving effect to this fundamental right. [6]

13. The approach currently applied by the Commission means that children whose degree of disability is deemed to be less than a certain percentage are automatically considered to be ineligible for the allowance. The Ombudsman took the view that automatically excluding such children from consideration is arbitrary and unreasonable, and does not necessarily follow from the applicable legislation. Article 67(3) of the Staff Regulations, which is the legal basis for the double allowance, does not draw a distinction between children with different degrees of disability. According to the Staff Regulations, the conditions for granting the allowance are: (a) whether the child has a disability and, if yes, (b) whether that disability entails heavy expenditure.

14. The Ombudsman also reminded the Commission that giving effect to the rights of persons with disabilities entails a heightened duty of care by the EU administration as an employer. The Ombudsman took note of the commitment made by the Commission [7], in line with the EU Strategy for the Rights of Persons with Disabilities [8], to improve the support it provides to staff with disabilities and to staff with a dependent family member with a disability. In light of all of the above, the Ombudsman made the following proposal for solution:

The Commission should reassess the complainant's request for the double dependent child allowance.

The Commission should propose revising Conclusion 177/87 so that it also provides for the possibility of granting the double dependent child allowance to all staff members who incur 'heavy expenditure' for dependent children with disabilities, and not only to those with children with a disability deemed to be above a certain threshold.

15. The Ombudsman added that, when reassessing the complainant's application, the Commission should provide him with clear information as to what supporting documents are required as proof of the cost of care for his child, including for the pecuniary value of the care provided by the child's mother.

16. The Ombudsman also noted that, as the process to revise Conclusion 177/87 may take some time, in the meantime, the Commission should take the findings of this inquiry into account in considering pending and future requests for the double dependent child allowance. That is, it should consider granting the double dependent child allowance also to staff members



who incur heavy expenditure for dependent children with a disability irrespective of the percentage of that disability.

Arguments presented to the Ombudsman following the proposal for a solution

By the Commission

17. The Commission argued that the threshold approach set out in Conclusion 177/87 on the application of the double dependent allowance ensures a high level of transparency and predictability in an area where the EU institutions enjoy a margin of discretion. The Commission added that the threshold approach contributes to a swift implementation of Article 67(3) and compliance with the principles of economy, efficiency and effectiveness laid down in the Financial Regulation.

18. The Commission is committed to ensuring that Conclusion 177/87 remains fit for purpose, which implies that it should be possible to grant the double dependent child allowance in all cases where there is high expenditure linked to a disability. As such, it is important to ensure that the assumption that no heavy expenditure would be incurred below a certain threshold of disability is based on solid and up-to-date medical assessments.

19. To this end, the Commission stated that it will propose that the Heads of Administration of the European Institutions and Bodies [9] consult the Inter-institutional Medical Board (CMI) [10] on the appropriateness of the current thresholds. In particular, the Commission said that it will propose that the CMI be asked whether, from a medical perspective, it is appropriate to assume that a disability below the thresholds laid down in Conclusion 177/87 would not give rise to heavy expenditure and does not require an individual assessment. Based on the opinion of the CMI, the Commission may consider proposing a revision of Conclusion 177/87.

20. However, the Commission stated that it would reassess the complainant's application for the double dependent child allowance only if and once Conclusion 177/87 has been amended. Carrying out a reassessment before any review of Conclusion 177/87 is concluded would violate the principle of equal treatment.

By the complainant

21. The complainant agrees with the solution proposed by the Ombudsman. The complainant is ready to undergo again the procedure to determine whether he is entitled to the double dependant allowance.

The Ombudsman's assessment after the proposal for a solution



22. The Ombudsman maintains the view that the threshold approach set out in Conclusion 177/87 does not derive from the provisions on the double dependent child allowance in the EU Staff Regulations, and seems to be at odds with EU administration's obligations under the UN CRPD.

23. The Ombudsman welcomes the Commission's statement that Conclusion 177/87 should be fit for purpose and that the Commission has started the process towards the possible revision of Conclusion 177/87. [11] She acknowledges that any potential revision will not be the decision of the Commission alone but be taken by the Heads of Administration. However, taking into account the findings of this inquiry, the threshold approach set out in Conclusion 177/87 should be overhauled, with a view to ensuring it accurately gives effect to the provisions of Article 67(3) of the Staff Regulations, namely that the double dependent child allowance should be granted when a child has a disability - regardless of its degree - that involves the staff member incurring 'heavy expenditure'. This would also ensure the EU administration complies with its obligations under the UN CRPD.

24. Conclusion 177/87 was last updated in 2004, before the EU acceded to the UN CRPD [12]. According to the UN CRPD, persons with disabilities have defined rights, including the right to benefit from measures designed to ensure their independence, social integration and participation in the life of the community. The fact that Conclusion 177/87 *automatically* excludes certain children with disabilities from the possibility to obtain the double dependent child allowance thus seems to be at odds with the EU's obligations under the UN CRPD. As the EU itself is a party to the UN CRPD, the UN CRPD's approach and standards must be streamlined in all actions by the EU administration. To this end, Conclusion 177/87 should have been revised much sooner. The Commission has a special responsibility to spearhead these reform efforts and to lead by example because the Commission is the designated focal point [13] for the EU under the UN CRPD.

25. The Ombudsman notes the Commission's argument that Conclusion 177/87 reflects a number of important principles, such as transparency, swift implementation and efficiency. However, due regard has to be given to the primary purpose of Conclusion 177/87, which is to give effect to Article 67(3) of the Staff Regulations. Accordingly, swift implementation, efficiency and transparency are meaningful only if Conclusion 177/87 *correctly* reflects the provision that it aims to give effect to, that is, providing financial assistance to staff members of children with disabilities whose care involves heavy expenditure.

26. Sophisticated solutions and treatments are now available that could make a real difference to an individual's full integration in society even if the disability is deemed to be "low". These solutions and treatments often involve considerable additional expenditure. As this is a dynamic field, any rules giving effect to double dependent child allowance should be fit for purpose also going forward. This requires an approach by which there is an individual assessment of each request and case.

27. Given that the review of Conclusion 177/87 may take some time, the Ombudsman regrets that the Commission is not yet ready to reassess the complainant's application for the double



dependent child allowance or to take into account the findings of this inquiry for other pending or future requests. She understands that any decision to change approach will need to be decided by the Heads of Administration, however she takes the view that, based on the findings of this inquiry, the Commission, and indeed the other institutions, should consider applying Conclusion 177/87 more flexibly to requests from now on.

28. As noted above, the Ombudsman considers that Conclusion 177/87 should have been revised much sooner. The Ombudsman therefore invites the Commission to follow up on the progress of the revision within three months and intends to revisit the matter if the outcome of the revision is not appropriate or is taking too long. The Ombudsman will also bring the matter to the attention of the Heads of Administration of the other EU institutions.

Conclusion

Based on the inquiry, the Ombudsman closes this case with the following findings:

The Ombudsman welcomes that the Commission has initiated the process to revise Conclusion 177/87.

The Ombudsman expresses regret that the Commission was unwilling to reconsider its approach to the double dependent child allowance from now on. She reiterates her view that it should apply the rules more flexibly, based on the findings of this inquiry, and while awaiting the revision of Conclusion 177/87. The Ombudsman will bring the matter to the attention of the other EU institutions, who are also responsible for revising and implementing Conclusion 177/87.

The complainant and the European Commission will be informed of this decision .

Emily O'Reilly

European Ombudsman

Strasbourg, 23/02/2023

[1] Article 67(3) of Regulation No 31 (EEC) laying down the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Economic Community:

<https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A01962R0031-20160101> [Link]



[2] Conclusion 177/87 of the Heads of administration concerning the double dependent child allowance under Article 67(3) of the Staff Regulations, most recently updated in 2014, sets out the conditions for granting the allowance. The allowance is automatically granted where the disability is calculated as being above 50%, according to the European Assessment Schedule for Physical and Mental Impairments. For mental disabilities above 20% or physical disabilities above 30%, and where the charges exceed the standard allowance, the double allowance may be granted. In these circumstances, the costs must be specific and supported by evidence.

[3] Case 1804/2009/MHZ

[4] Article 26 of the Charter stipulates: ‘*The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.*’

[5] More information on the EU’s commitments under the CRPD:
<https://fra.europa.eu/en/cooperation/eu-partners/eu-crpd-framework> [Link].

[6] See case 899/2011/TN, para. 12: <https://www.ombudsman.europa.eu/en/decision/en/11111> [Link]

[7] In its new Human Resources Strategy, adopted in April 2022:
https://ec.europa.eu/info/sites/default/files/c_2022_2229_2_en_act_part1_v12.pdf [Link].

[8] <https://ec.europa.eu/social/main.jsp?catId=1484> [Link]

[9] The *Heads of Administration* is a forum that brings together the staff members in charge of the day-to-day administrative running of the EU’s institutions, bodies, offices and agencies. It meets on a regular basis and may adopt ‘conclusions’ setting out the approach to practically applying or giving effect to aspects of the EU Staff Regulations.

[10] The Inter-institutional Medical Board (CMI) provides advice to the EU institutions, bodies, offices and agencies on medical, health and related issues.

[11] The Ombudsman is aware that this proposal was tabled at a meeting on 1 December 2022 and that the matter is now pending before the CMI. However, no concrete time-line for receiving the medical advice and for potential follow up steps has been established.

[12] The EU’s ratification of the UN CRPD took effect in 2011.