

## **Report on the European Ombudsman targeted consultation on the Joint Sickness Insurance Scheme and the UN Convention on the Rights of Persons with Disabilities (OI/4/2016/EA)**

Correspondence - 10/04/2019

**Case** OI/4/2016/EA - **Opened on** 10/05/2016 - **Recommendation on** 10/04/2019 - **Decision on** 04/04/2019 - **Institution concerned** European Commission ( Recommendation agreed by the institution ) |

### **1. Background**

On 10 May 2016, the European Ombudsman opened a strategic inquiry (OI/4/2016/EA) on whether the treatment of persons with disabilities under the Joint Sickness Insurance Scheme ('JSIS') for EU civil servants and their families complies with the UN Convention on the Rights of Persons with Disabilities ('UNCRPD').

The inquiry focuses, in particular, on the criteria for the recognition of "serious illness" - which determine whether medical costs can be fully reimbursed - as set out in the European Commission's General Implementing Provisions ('GIPs') [1] . Failure to recognise a condition as constituting a "serious illness" affects the percentage of cost reimbursed by the JSIS. The Ombudsman is concerned that those criteria, notably the criterion of "shortened life expectancy", may not necessarily be suited to the specific situation of persons with disabilities. Many disabilities, although they may have a very significant impact on the well-being of the person concerned, do not necessarily impact negatively on life expectancy. However, they may give rise to high expenses in terms of treatment, medication or special devices/ equipment, which are essential for the person's full and effective participation in society on an equal basis with others.

As a first step in the inquiry, the Ombudsman put specific questions to the Commission, to which the Commission replied. The Ombudsman's inquiry team also met with Commission representatives to discuss the case. [2]

Arising from the Commission's replies to her questions, the Ombudsman identified a range of issues on which she expected to make suggestions to the Commission. She launched a targeted consultation asking for the addressees' views on the relevant suggestions. The



consultation was addressed to the European Parliament's Disability Support Group ('EP DSG'), the European Commission's Disability Support Group ('EC DSG'), the Association of Staff with a Disability in the European Commission ('ASDEC'), as well as to the European Disability Forum ('EDF').

The Ombudsman received contributions from all 4 addressees. She also received two spontaneous contributions from individuals. [3]

## 2. Overview of the responses to the suggestions

### Application of the four criteria for the recognition of serious illness (Suggestion 1)

The Commission says that in the application of the four GIPs' criteria relevant to recognising a "serious illness", it does not take a 'tick all the boxes' approach. Rather, a flexible approach is applied. This means that if a person meets one criterion to a very large extent, this may compensate for the fact that the person does not meet another criterion to a significant extent.

**The Ombudsman suggested that the fact that this kind of discretion may be exercised in practice, when applying the four criteria for the recognition of a "serious illness", should be made clear by the Commission in the GIPs.**

As regards the applicable framework, respondents referred to the UNCRPD as well as to the Charter of Fundamental Rights. In particular, a respondent referred to the prohibition of discrimination on grounds of disability set out in Article 21(1) of the Charter, arguing that by using the same criteria to assess the severity of "illness" and "disability", the Commission was discriminating against disabled persons by treating different situations in the same way.

Respondents expressed the concern that the Ombudsman's suggestion would not be sufficient to avoid discrimination against staff members with disabilities or who have family members with disabilities. The issue is not merely one of discretion in the application of the four criteria but the four criteria as such. They argued that additional criteria and/or special provisions should instead be introduced for persons with disabilities.

In this regard, respondents questioned the relevance of the notion of "serious illness" in the case of persons with disabilities. It was pointed out that, although they may overlap in certain cases, "illness" and "disability" are distinct concepts, as has been recognised in the Court's case law [4]. Therefore, criteria for assessing the seriousness of an illness will not necessarily be appropriate with regards to disability.

In particular, the criterion of shortened life expectancy was identified as problematic with regards to persons with disabilities, as a serious disability may have a significant impact on a person's well-being without necessarily shortening life expectancy. In this regard, a respondent



referred to the use of alternative measures that are sensitive to the quality of life, such as the Disability-Adjusted Life Years ('DALYs').

One respondent suggested that attestations or certificates of “serious disability” delivered by national health systems should be accepted for the purposes of determining whether the person in question has a serious illness, and thus qualifies for maximum reimbursement of costs incurred.

Notwithstanding the above, it was noted that, after some major problems in the years 2013-2015, practices as regards the application of the four criteria for the recognition of serious illness have lately improved, particularly in the JSIS Brussels settlements office.

## Identification of GIP provisions that need to be revised in view of the UNCRPD (Suggestion 2)

Since the January 2014 changes to the Staff Regulations, aimed at ensuring their full compliance with the UNCRPD, the Commission does not see a need for further significant legislative or regulatory changes in relation to the JSIS.

**The Ombudsman suggested that the Commission should carry out an assessment to identify whether any provisions of the GIPs and/or the related forms [5] , need to be revised in view of the UNCRPD and the UNCRPD Committee's concluding observations in 2015. [6]**

The respondents agreed that an assessment should be carried out in order to evaluate compliance of the GIPs and the related forms with the UNCRPD, some adding that this assessment should extend to the 2014 Staff Regulations and the JSIS Joint Rules. [7] Three respondents suggested that the assessment should be carried out by external independent experts.

## Introduction of a list of reimbursable assistive devices (Suggestion 3)

According to the Commission, the absence of a detailed list of reimbursable assistive devices under the JSIS allows for more flexibility, which is necessary in dealing with disability-related health needs. However, the Ombudsman considers that the publication of a (non-exhaustive) list would provide a degree of clarity to persons with disabilities on the type of devices that can be reimbursed.

**The Ombudsman suggested that the Commission should publish a non-exhaustive list of reimbursable assistive devices under the GIPs .**

The respondents supported the Ombudsman's suggestion. One respondent suggested that the



World Health Organisation's ('WHO') Priority Assistive Products List ('APL') should be used as a reference. Another respondent proposed that the list should be readily available and accessible, as well as open to regular review.

## Review of medical files (Suggestion 4)

When examining a complaint under Article 90 (2) of the Staff Regulations [8] against a decision by the Commission's Paymaster Office (PMO) not to recognise a "serious illness", PMO submits the complaint to a Medical Officer, who re-analyses the file and issues a reasoned opinion. If required, the specific case may be presented to the Medical Council [9] , for example where the individual case is particularly difficult or where it may (potentially) concern a greater number of cases.

**The Ombudsman suggested that the PMO should ensure that any review of a medical file, following a complaint under Article 90 (2) of the Staff Regulations, is carried out by a different Medical Officer than the one who provided an opinion in the context of the contested decision.**

Two respondents recognised this as a problematic issue and another one welcomed the suggestion. One respondent considers that, generally, Medical Officers should be required to give reasons for their opinions at the initial stage, and criticised them for often being short and difficult to understand.

Two respondents raised an additional issue which they consider problematic. They argue that the Commission (as the Appointing Authority) misuses the procedure of Article 90 (2) of the Staff Regulations by requesting a second reasoned medical opinion. The respondent highlights that under Article 35(2) of JSIS Joint Rules, only the Management Committee for the JSIS [10] ('Management Committee') is entitled to seek expert medical advice before giving its opinion. Therefore, the role of the Appointing Authority when examining such a complaint should be limited to verifying if the Medical Officer, in issuing the first medical opinion, has complied with the requirements laid down in the GIPs and as interpreted by the case law.

The same respondents further noted that, according to the current rules, the Appointing Authority is not required to follow the opinion of the Management Committee. They suggest however that the Commission should always follow the opinion of the Management Committee when responding to complaints under Article 90(2) of the Staff Regulations.

## Framework and resources regarding the non-medical needs of persons with disabilities (Suggestion 5)

The Commission notes that the JSIS covers only medical expenses relating to disabilities. However, there are other kinds of support which address social aspects of disabilities. There are three types of benefit outside the JSIS for persons with disabilities: i) the social aid scheme, ii)



the doubling of the dependent child allowance, iii) “reasonable accommodation” for employees with a disability. However, it seems that these schemes cover the non-medical needs of persons with disabilities in a limited way and there appear to be certain restrictions; there is a limited institutional budget for the social aid scheme, the entitlement to reimbursement under the social aid scheme is linked to specific thresholds as regards family income, the benefits are granted upon the assessment of a certain degree of disability, etc.

**The Ombudsman suggested that the Commission should carry out an assessment to identify - in a non-exhaustive way - non-medical needs relating to disabilities. It should initiate a procedure to ensure that the non-medical needs of EU civil servants - and their families - with disabilities are addressed in a satisfactory way, through the allocation of sufficient resources and within an appropriate framework, under the EU institutions’ social schemes. [11] As regards reasonable accommodation provided to its own staff, the Commission should review its current rules, [12] adopted in 2004, in the light of the provisions of the UNCRPD which apply since 2011.**

The respondents supported the Ombudsman’s suggestion.

A respondent pointed to a lack of clarity as to which non-medical expenses would be covered by the Commission’s and other institution’s social welfare schemes and which ones were covered by the JSIS, as some therapies, appliances or home care have sometimes been covered by the former and other times by the latter.

Concerning the proposed assessment, one respondent suggested that it should be carried out by external independent experts. The need to consult staff members with disabilities, or who have family members with disabilities in this process, was emphasised. A respondent suggested, in particular, that a suitable body involving representatives of these staff members should be set up in order to study the current situation as regards the day-to day application of the EU institution’s social schemes, including the application of the budget line under the “social aid” for persons with disabilities (“supplementary aid for the disabled”) and propose ideas and means of improvement if necessary.

The **social aid scheme** - which depends on an institutional “disability” budget line - was criticised for being difficult to access due to restrictive family income thresholds, as well as not being well known to staff and having no fixed budgetary allocation.

Two respondents pointed out that the **dependent child allowance** referred to by the Commission covers only those staff who have additional costs related to their children’s disabilities, whereas financial assistance for costs associated with disabled staff’s parenting duties (e.g. transport, house chores, certain childcare activities) is unavailable or inadequate.

As regards **reasonable accommodation**, the point was made that its purpose is to allow staff members with disabilities to do their work in the best conditions possible and should therefore not be seen as “special treatment”. It was added that most “reasonable accommodations” are related to the particular office set-up, working practices and office culture where the individual is



working, and as such have no need of a medical input. One respondent stressed the need to provide appropriate budgets for the various required forms of support and intermediaries (e.g. personal assistant, professional sign language interpreters, mediators, peer counselling, etc). Another respondent suggested that a review of the current rules could start by mapping out existing workflows in order to determine who does what, when and why, in order to highlight issues in the procedure. It was also suggested that the current practice, of decisions on reasonable accommodation being made by the Head of Unit of the staff member with a disability, should be changed. This is because this practice could lead to an inconsistent approach and to service interests being prioritised over those of the staff member concerned. It was therefore proposed that such decisions instead be made by a third party, independent of both the service where the official works and the Medical Service. A respondent referred to the idea of a “reasonable accommodation” board with representation of staff members with disabilities.

## Review of the medical certificate (Suggestion 6)

The “medical certificate” common to all EU institutions, which refers to the European Assessment Schedule for Physical and Mental Impairments (also known as the “European Disability Scale”), is not used to recognise a “serious illness”. However, it is used for granting the doubling of the dependent child allowance and social aid benefits relating to disabilities. Representatives of persons with disabilities contend that this scale is excessively medicalised and does not take into account the individual circumstances relating to disabilities.

**The Ombudsman suggested that the Commission should initiate a review, by the Inter-institutional Medical Board, of the content of the medical certificate as regards, in particular, the appropriateness of the European Disability Scale in assessing a person's degree of disability.**

Respondents welcomed the Ombudsman’s suggestion.

It was contended that the scale is particularly inappropriate in the case of children with special educational needs. It was noted that the recently adopted revised assessment form no longer includes a reference to learning difficulties.

One respondent suggested that assessment should draw upon the WHO’s International Classification of Functioning Disability and Health (‘ICF’), as well as upon the WHO Disability Assessment Schedule 2.0, which is a generic assessment instrument for health and disability.

## Training of staff (Suggestion 7)

In the context of its social protection schemes, the Commission says that special training on how to deal with disability is available for all Commission staff.



**The Ombudsman suggested that the Commission should ensure that special training on how to deal with disability is part of the induction programme for its staff working on related issues.**

Respondents welcomed the Ombudsman's suggestion.

It was suggested that formal training organised by the Commission should adopt a more targeted approach, and that it should be complemented with short information sessions on different aspects of disability. In this regard, another respondent suggested that training should cover the UNCRPD, the human rights based approach to disability and the concept of reasonable accommodation.

Mandatory participation in such training was proposed for targeted groups, such as new managers, managers who currently have staff members with disabilities under their responsibility, staff working in the context of the Commission's social protection schemes and JSIS, and those working in HR functions. It was further suggested that persons with disabilities and relevant organisations should be directly involved in the development and implementation of such training.

## **Consultation with interested parties with a view to revising the JSIS (Suggestion 8)**

According to its Diversity Communication of July 2017, the "*Commission will set up a suitable body to study the current situation and to propose ideas and means to lighten as far as possible the burden of staff with disabilities*". [13] In its reply of October 2016 to the Ombudsman's letter, the Commission stated that it is considering consulting persons with disabilities on the application of the JSIS in relation to disability-related health needs.

**The Ombudsman suggested that the Commission should, as referred to in its letter to the Ombudsman, set up a suitable body, involving representatives of persons with disabilities, employees with disabilities and/or associations of persons with disabilities, to study the current situation as regards the day-to-day application of the JSIS in relation to disability-related health needs, and, if necessary, to propose ideas and means of improvement. The Commission should set out a detailed timeline for this process. It should ensure that the representatives of persons with disabilities are consulted in a structured and meaningful way and that the results of this consultation are implemented in practice.**

The respondents agree with the Ombudsman's suggestion. One respondent however expressed the view that the task carried out by this body should not be limited to studying the day-to-day application of JSIS, but also extend to examining the JSIS framework (Joint Rules and GIPs), with the objective of making these compliant with the UNCRPD.





## Establishing regular contacts with associations of persons with disabilities (Suggestion 9)

The Commission says that it has been in contact with the newly set up association of Commission staff members with disabilities, and with the association of Commission staff members who have a family member with a disability.

**The Ombudsman suggested that the Commission should establish regular contacts with the associations of EU staff members with disabilities (or of EU staff members who have family members with disabilities) in order to receive feedback on the day-to-day application of the JSIS and of the social schemes for persons with disabilities.**

The respondents agreed with the Ombudsman's suggestion.

The need to consult not only staff members with disabilities but also staff members with dependants with disabilities was emphasized. Two respondents are concerned about the lack of structured consultation between the Commission and their associations on matters related to disabilities and especially in the development and the implementation of relevant legislation and policies, i.e. during the preparation of the Diversity Communication. They say that such consultation should take place in a meaningful and timely manner.

One respondent suggested that the Staff Regulations be changed so as to require at least one member of every Staff Committee to be a colleague with a disability. It was also suggested that proper consultation and representation of Commission officials with disabilities would be best achieved by establishing a formal representative role or a statutory body of which they could be members.

## 4. Other points raised

### Renewal of a recognition of a serious illness

Respondents to the consultation referred to the provision in the GIPs that the recognition of a "serious illness" has to be renewed every 5 years. A respondent pointed out that persons with disabilities must go through this burdensome procedure (a medical report is required) every 5 years, despite the fact that their disability might be permanent and unchanging.

### Coverage of fees for alternative schools for children with disabilities

Another issue raised by respondents concerns the use of the 'social aid' budget line in order to reimburse the costs of parents of children with special educational needs whose children are not accepted at the European Schools. According to a respondent, while school fees at European





Schools are paid by the EU institution where the staff member works, parents who cannot bring their children to European schools have to cover themselves a substantial part of the fees for alternative schools, or even the whole amount, if they are not granted any financial aid from the 'social aid' budget line. It was further noted that the requirement for parents to apply annually for the social grant for alternative schooling is time-consuming and a source of anxiety due to the delays in decisions and grant payments compared to the schools' payment schedules. The respondent suggested that the Commission should end the discriminatory treatment of staff members with children having special education needs who cannot be enrolled in European Schools and fully cover the fees of alternative schools. The Commission should also allocate enough staff to deal with requests for financial help in a timely manner.

## Applicable rules for the Management Committee

One respondent noted that in carrying out its work, the Management Committee never takes into account the UNCRPD, the Charter of Fundamental Rights, the Code of Good Administrative Conduct and Article 1 d (4) of the Staff Regulations. The respondent asked the Ombudsman for clarification on whether this should be the case or not.

## Equality of arms between claimants and PMOs

A respondent referred to the lack of 'equality of arms' between claimants and PMOs. While the Management Committee cannot contact the claimant, the PMO has close contact with the claimant. Representatives of the Central Office and the Settlement Offices are present at all plenary meetings where they actively intervene to defend their opinions. The opinion of the Medical Officer is considered final and he/she can invalidate the conclusions of specialist doctors who have directly examined the patient, without himself/herself having done so. The PMO can raise additional arguments in order to refuse a claim, which the claimant has no opportunity to address.

## Role of Medical Officers

A respondent suggests that there should be some verification that all Medical Officers are registered in a medical association and apply the deontological rules applicable in their country of establishment.

Independence of Medical Officers must also be ensured, which depends on the duration and stability of their contracts, their mode of remuneration and the diversity of their income sources. In this regard, the respondent stresses the need to make the contracts for Medical Officers more "attractive", in order to increase the number of applications from, and recruitment of, specialist practitioners, who would be better placed to evaluate claimants' requests.

The fact that claimants cannot be examined by the Medical Officer is raised as problematic. The



respondent proposes that the Medical Officer should be required to conduct an examination of the claimant where he/she intends to depart from the conclusions of his/her attending practitioner. In case this is not possible due to geographical distance, the Medical Officer could mandate another practitioner to examine the claimant.

## Reimbursement of fees for practitioners established in another Member State

A respondent requested clarification on whether practitioners established in a Member State other than where the provision of services takes place were considered to be “*professionally qualified and legally recognised practitioners*”, for the purposes of reimbursement of treatments (Title II, Chapter 8, point 1.4 GIPs). The respondent notes that this is of specific relevance for children with disabilities, who sometimes require speech therapy, and should not be required to follow this in a language with which they are not familiar or to travel for each session.

## Improving access to healthcare

A respondent proposed that the PMO should designate specific interlocutors for persons with disabilities. They should be reached by phone and follow the persons’ requests relating to both medical and social aspects of their disability.

The respondent calls for the PMO and the social services to provide detailed information on the assistance provided for persons with disabilities or persons with a “serious illness” at national level. The respondent also calls for staff members to be informed on the merits of maintaining pension rights in a national system, so as to be able to obtain coverage through a national sickness insurance scheme and a European Health Insurance Card after retiring.

The respondent further suggests that affiliated persons should be assisted with the problem of excessively high bills and fee discrimination in the provision of healthcare. It is proposed, by way of example, that lists of establishments offering good price-quality ratios and lists of doctors following the basic rates could be drawn up and published.

## 5. Summary of responses

Three respondents suggested that the Ombudsman should make recommendations to the Commission instead of suggestions. The respondents were overall favourable to the Ombudsman’s suggestions, with the exception of Suggestion 1 concerning the application of the four criteria for the recognition of serious illness. They emphasised that “illness” and “disability” are separate concepts and that separate criteria for persons with disabilities would be preferable. As regards the rest of the suggestions, the respondents provided feedback on additional points that need to be addressed.



Strasbourg, 16/07/2018

[1] Commission Decision laying down general implementing provisions for the reimbursement of medical expenses, which entered into force on 1 July 2007.

[2] All inquiry-related documents are available here:

<https://www.ombudsman.europa.eu/en/cases/caseopened.faces/en/65814/html.bookmark> [Link]

[3] One of the spontaneous contributions was confidential.

[4] Case C-13/05, *Chacon Navas v Eurest Colectividades SA*, ECLI:EU:C:2006:456, paragraph 44.

[5] By way of example, the two forms attached to Chapter 3 of Title II of the GIPs, which are specific to assessing the possible reimbursement of the cost of a permanent or long-term residence in a paramedical establishment. The forms are entitled: I. Functional independence evaluation; II. Evaluation of spatial and temporal awareness.

[6] Concluding observations regarding the EU's implementation of the Convention on the Rights of Persons with Disabilities made by the relevant UN Committee, 2 October 2015.

[7] Joint Rules on sickness insurance for officials of the European Communities, adopted by common accord by all the Community institutions, which entered into force on 1 December 2005, <http://data.consilium.europa.eu/doc/document/ST-9645-2004-INIT/en/pdf>

[8] According to Article 90 (2) of the Staff Regulations, any person to whom the Staff Regulations apply may submit to the appointing authority a complaint against an act affecting him adversely, either where the said authority has taken a decision or where it has failed to adopt a measure prescribed by the Staff Regulations.

[9] The Medical Council of the JSIS consists of one Medical Officer from each institution and the Medical Officers from each Settlements Office. It is consulted by the bodies provided for by the JSIS Joint Rules, on any medical issue arising in connection with the administration of the JSIS.

[10] The Management Committee for the JSIS (Comité de Gestion d' Assurance Maladie ('CGAM')) consists of representatives of the various EU institutions and agencies and of the staff.

[11] The Ombudsman understands that the detailed provisions for granting these benefits are set out in the:

i) Provisional Guidelines for implementation of the budget heading "Supplementary aid for the disabled" concerning welfare appropriations for disabled persons, adopted on 19 February 2004 by the College of Heads of Administration.



ii) Conclusion 177/87 of the College of Heads of Administration regarding the double dependent child allowance for a child whose maintenance involves heavy expenditure by reason of a disability or a long-term illness (Article 67 (3) of the Staff Regulations). The 2nd revised conclusion was approved by the Heads of Administration on 26 March 2014.

[12] Commission decision of 7 April 2004 implementing Article 1d(4) of the Staff Regulations .

[13] Commission Communication “A better workplace for all: from equal opportunities towards diversity and inclusion”, C (2017) 5300 final, 19.7.2017.