



Emily O'Reilly
European Ombudsman

Mr Jean-Claude Juncker
President
European Commission

Strasbourg, 10/05/2016

Own-initiative inquiry OI/4/2016/EA: on whether the treatment of persons with disabilities under the Joint Sickness Insurance Scheme (JSIS) complies with the UN Convention

Dear Mr President,

I have recently dealt with two complaints in relation to the Joint Sickness Insurance Scheme (JSIS), submitted by two EU staff members whose children have disabilities. As the cases raise a systemic issue, I have decided to open the present own-initiative inquiry and to put on hold, for the time being, my examination of the two complaints.

I do so against the following background: in October 2015, following its first review of the EU's compliance with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the UN Expert Committee made the following comments as regards Article 25 UNCRPD¹ on Health:

"86. The Committee is concerned that European Union staff members with disabilities or who have family members with disabilities are discriminated against by European Union health insurance schemes.

87. The Committee recommends that the European Union revise its Joint Sickness and Insurance Scheme so as to comprehensively cover disability-related health needs in a manner that is compliant with the Convention".

Article 72(1) of the Staff Regulations provides that in exceptional cases (for example, tuberculosis, poliomyelitis, cancer, mental illness or "other serious illness"), the reimbursement rate for medical expenses can be increased to 100%,

¹ Article 25 - Health

"States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability... In particular, States Parties shall... e) Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner..."



upon a decision of the Appointing Authority to recognise a serious illness. The practical arrangements and procedures are set out in Title III, Chapter 5 of the Commission's General Implementing Provisions (GIP).² Under these Provisions, for an illness to be recognised as "serious", four criteria must be satisfied; there must be: (i) a shortened life expectancy, ii) an illness which is likely to be drawn-out, iii) the need for aggressive diagnostic and/or therapeutic procedures and iv) the presence or risk of a serious handicap. Civil Service Tribunal case law³ has ruled that these criteria are cumulative. There are currently no specific rules granting medical reimbursement at a rate of 100% to persons with disabilities, unless the health impact of the disability meets the four criteria established to recognise a "serious illness".

To my mind, there are potentially four difficulties with this approach:

First, this purely medical approach to disability is not aligned with the social model approach promoted by the UNCRPD⁴, confirmed by the Court's case-law⁵, and endorsed in the new Article 1(d)(4) of the amended Staff Regulations, which defines disability as a long-term physical, mental, intellectual or sensory impairment which, in interaction with various barriers, may hinder the person's full and effective participation in society on an equal basis with others.

Second, the above criteria treat the concepts of "illness" and "disability" as identical, although the Court's case law, in the context of interpreting the Equality Employment Directive, has confirmed their distinct character.⁶ Disability Support Groups in EU institutions have argued that many kinds of disability do not constitute a "serious illness" *per se*.⁷

Third, those criteria, and in particular the criterion of shortened life expectancy, are not always suited to the specific situation of persons with disabilities nor are they always appropriate to assess the gravity of a disability. Many disabilities, although they have a very significant impact on the well-being of the person concerned, do not necessarily impact negatively on life expectancy. 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. If such treatment, medication or special devices/equipment cannot be provided, the consequences can be severe. This is particularly the case for children with disabilities, where intensive early treatment can have very significant positive and enduring benefits for their welfare.

² Commission Decision laying down general implementing provisions for the reimbursement of medical expenses, which entered into force on 1 July 2007, http://ec.europa.eu/pmo/tender/06_annexe6_dge_en.pdf

³ Judgment of 18 September 2007 in Case F-10/07, *Botos v Commission*, paragraphs 41-44.

⁴ In its preamble, the UNCRPD recognizes disability as an "evolving concept" which results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others. In Article 1 it is stated that: "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others".

⁵ Judgment of 11 April 2013 in joined cases C-335/11 and C-337/11, *HK Danmark*, paragraph 38.

⁶ Judgment of 11 July 2006 in Case C-13/05, *Chacon Navas v. Eures Colectividades SA*, paragraph 44.

⁷ EPRS In-Depth Analysis, The obligations of the EU public administration under the UN Convention on the Rights of Persons with Disabilities – European Implementation Assessment, March 2016, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579325/EPRS_IDA\(2016\)579325_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/579325/EPRS_IDA(2016)579325_EN.pdf)



Fourth, Article 21(1) of the Charter of Fundamental Rights of the EU provides that “[a]ny discrimination based on any ground such as ... disability ... shall be prohibited”. In accordance with settled case-law, the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way.⁸ It is arguable that assessments of the severity of disabilities and assessments of illnesses should be based on different criteria. In particular, in assessing whether a disability is “severe”, the issue of life expectancy is not necessarily a relevant criterion. Treating the two concepts as the same, and not ensuring specific provisions to assess the severity of a disability, is arguably not compliant with the UNCRPD provisions and the case law. Separate criteria and/or specific provisions may therefore be necessary as regards reimbursing medical expenses for persons with disabilities under the JSIS.

Against this background, it would be helpful to obtain answers to the following questions:

- 1) How does the Commission intend to follow up on the UN Expert Committee observation suggesting that “the European Union revise its Joint Sickness and Insurance Scheme so as to comprehensively cover disability-related health needs in a manner that is compliant with the Convention”? Please provide a list of measures already taken and/or envisaged.
- 2) Specifically, does the Commission intend to introduce separate criteria under the GIP and/or special provisions for the reimbursement of the medical costs of persons with disabilities under the JSIS? If not, please provide an explanation as to why not, addressing the four points outlined above.
- 3) Please provide, if available, anonymised details on the number of applications for a serious illness to be recognised submitted by or on behalf of persons with disabilities since the UNCRPD entered into force for the EU (January 2011). How many of these applications were rejected? How many individuals subsequently submitted a complaint under Article 90.2? How many of these complaints were rejected?

You will be aware that this is the third time that I have written to the Commission to follow up on concluding observations of the UN Expert Committee. The responses to my two previous letters (on European Schools and website accessibility) suggest that the Commission is of the view that there is only marginal scope for improvement. As regards the JSIS, my preliminary view is that a much more ambitious approach is required. In this context, I was pleased to receive a positive response from the Commission to a recent further remark in a JSIS-related case, in which the PMO agreed to include in all its decisions information about how to lodge an appeal.

I would be grateful to receive your opinion in this inquiry by 30 September 2016. Should your services require any further information, they

⁸ Such treatment may be justified only if it is based on objective considerations and is proportionate to the objective being legitimately pursued. See, by way of analogy with discrimination on grounds of nationality, Case C-155/09 *Commission v Greece* [2011] ECR I-65, paragraph 68 and the case-law cited therein.



may contact Ms Elpida Apostolidou in the Ombudsman's Strategic Inquiries Unit (Tel: +32 (02) 284 18 76).

Yours sincerely,

Emily O'Reilly