

Contribution to the European Ombudsman's consultation

on the Joint Sickness Insurance Scheme (JSIS) and the UN Convention on the Rights of Persons with Disabilities (UNCRPD) in the context of Strategic enquiry OI/4/2016/EA.

Brussels, 31 January 2018

1. Introduction

ASDEC (Association of Staff with a Disability in the European Commission) would like to thank the European Ombudsman for the opportunity to contribute to this targeted consultation.

The UN Committee, in its 2015 observations relating to EU implementation of the UN CRPD, noted its concern that *"EU staff members with disabilities or who have family members with disabilities are discriminated against by European Union health insurance schemes"*. In addition, the Committee recommended that the JSIS be revised *"in a manner that is compliant with the Convention."* ASDEC considers that the treatment of staff with a disability under the Joint Sickness Insurance Scheme (JSIS) does not comply with the UN Convention on the rights of Persons with Disabilities (UN CRPD) and therefore welcomes the Ombudsman's Strategic Enquiry on the matter. All comments in this contribution should be taken in that context.

This contribution introduces ASDEC, includes general remarks followed by observations relating to the three chapters in the consultation document and the Ombudsman's suggestions contained therein: disability-related needs, social protection and consultation.

2. Presenting ASDEC

Formally established in May 2017, the aims of ASDEC are to:

- represent and defend the views of staff with a disability to the administration;
- make proposals for developments to Commission staff policies and services as these affect staff with a disability;
- raise awareness of the situation of staff with a disability, including the organization of activities on the topic of the inclusion of persons with a disability;
- share practical experiences amongst each other and with similar organizations.

Staff members with a disability, consistent with the definition in the UN CRPD as well as in the Staff Regulations, are those who '*...have a long-term physical, mental, intellectual or sensory impairment which in interaction with various barriers, may hinder their full and effective participation in society on an equal basis with others.*' This definition therefore covers both staff with a disability and those with a long-term health condition.

The Association has been set up by a small group of officials with a disability or long-term health condition as an internal 'de facto' association for staff with a disability. These members have identified a range of key issues of concern to staff with a disability. A priority is to expand membership, in order to embrace as broad a range of staff with a disability as possible. This is a particular challenge given the lack of information held within the European Commission either on the number of staff with a disability or on the identity of the staff concerned.

3. General remarks

ASDEC regrets that the Ombudsman does not address the Commission's failure to implement the social (or human rights) model of disability in line with the UN CRPD.

As the Ombudsman has stated in the context of her own-initiative enquiry on the JSIS a "*purely medical approach to disability is not aligned with the social model approach promoted by the UNCRPD, confirmed by the Court's case-law¹, and endorsed in the new Article 1(d)(4) of the amended Staff Regulations.*"

From high-level policy such as the recent Communication on Diversity, to the JSIS and its implementing rules, to the in-house approach to reasonable accommodation within the Commission, the Commission's approach to disability remains squarely within the medical model.

Indeed, the Commission's new internal 'disability portal' launched by Commissioner Oettinger on 5 December 2017 states, in stark contradiction to the definition of disability in the Staff Regulations:

"Definition and recognition

A disability is a condition that hinders full participation in society. It can be permanent or non-permanent, visible or non-visible, physical or mental.

At the Commission, the recognition of a disability is done by the [Medical Service](#). The [physical and mental disability rating scale](#) serves as legal basis."

Recommendations for changes to the JSIS will be of limited or no value while the Commission continues to operate within this medical model, since any such changes will not address the underlying problems with the current rules with regard to staff with a disability or chronic health condition. For example, to receive full reimbursement of disability-related medical costs, staff members with a disability must be recognised as having a "serious illness", whereas many individuals with a disability do not have a 'serious illness'.

¹ Judgment of 11 April 2013 in joined cases C-335/11 and C-337/11, HK Danmark, paragraph 38.

The failure to consult on how to replace the current systematic medicalisation of disability by the Commission with a more social, functional approach is a serious omission from the Ombudsman's consultation document which needs to be addressed as a matter of priority.

ASDEC also notes with some concern that the Ombudsman has limited herself to issuing "suggestions". We strongly urge the Ombudsman to issue "recommendations" which may be interpreted as being stronger or more binding. Moreover, all recommendations should be accompanied by a target date for implementation by the Commission and follow-up on implementation by the Ombudsman.

4. Disability-related needs under the JSIS (Ombudsman suggestions 1 – 4)

In line with the remarks above, there is an urgent need to revise the GIPs, in order to introduce a new legal provision which would concern the situation of individuals with a disability (independently of any serious illness, which is another issue).

Suggestion 1:

The issue is not merely one of discretion in the application of the four criteria for the recognition of disability. The fundamental problem is that for the purposes of the JSIS, disability is qualified, in all cases, as "serious illness" as defined under of Article 1 of Chapter 5 of Title III of the GIPs.

"Serious illnesses include tuberculosis, poliomyelitis, cancer, mental illness and other illnesses recognised by the appointing authority as of comparable seriousness."

However, disability and serious illness are not identical (these are two different notions which may, in certain cases, have certain elements in common).

The four GIP criteria listed under Article 1 of Chapter 5 of Title III of the GIPs are relevant to recognising a serious illness only and may not be always relevant to recognising or assessing a disability:

- a shortened life expectancy
- an illness which is likely to be drawn-out
- the need for aggressive diagnostic and/or therapeutic procedures
- the presence or risk of a serious handicap.

[...]

Furthermore, according to the same provision, "100% cover for expenditure related to serious illness is granted from a start date (the date of the medical certificate) to a date in the future, which cannot be more than 5 years". This means that every 5 years, staff members with a disability must go through the burdensome procedure (a medical report is required) of having their disability recognised, despite the fact that their disability might be permanent and unchanging.

Suggestion 2:

The Ombudsman may consider inviting an external independent expert to carry out an analysis identify where the 2014 Staff Regulations and the whole JSIS framework including the GIPs do not comply with the UNCRPD. On the basis of that assessment, the Commission, together with representatives of the other EU institutions, including staff with disabilities, should rapidly define solutions (including the adoption of modifications to those instruments where necessary) to bring them into compliance.

Suggestion 3:

Any non-exhaustive list should be readily available and accessible; and open to regular review.

Suggestion 4:

A general suggestion, whatever the files and possible complaints, the Medical officers should be required to motivate their opinions at the very initial stage. Too often, opinions are short, poorly motivated, and difficult to understand.

5. Social protection for persons with disabilities (Ombudsman suggestions 5 – 7)

Suggestion 5:

This suggestion includes two important issues – social protection as well as reasonable accommodation.

Social protection

When joining the European Commission as a staff member with a disability, one leaves (exits) one's own MS and its social protection scheme which may have disability-related contributions (which are, it should be noted, not necessarily categorised as medical and non-medical). This can result in additional financial burdens and creates a discriminatory situation as regards staff without a disability.

Any assessment of social protection as it relates to staff members with a disability must take account of the fact that reasonable accommodation may imply the reimbursement for non-work and non-medical disability-related costs. Currently, the social aid scheme which depends on a "disability" budget line, referred to by the Commission in its response, is subject to very restrictive family income thresholds, making it virtually unusable. Moreover, it is not well known to staff with a disability and it has no fixed budgetary allocation.

The same disability budget line is used to reimburse the costs of parents of children with special educational needs (SEN) whose children are not accepted at the European Schools. The fact that the European schools do not fully include children with a disability is not only highly regrettable from the point of view of their right to an inclusive education (as set out in the UN CRPD) but moreover, means that costs related to SEN are shouldered by the European Commission rather than the schools

who should have a duty to ensure that the educational programmes they provide are non-discriminatory.

The dependent child allowance, mentioned by the Commission, only addresses the situation of staff whose children have a disability and who have additional costs associated therewith – on the other hand, staff members with a disability who are also parents and who have additional costs associated with parenting because of their disability (e.g transport, house chores, certain childcare activities) have no recourse to financial or other support, notably because of the means-tested criteria which are applied for eligibility which *de facto* exclude most staff.

Finally, while certain costs may be covered by Belgian regional or federal authorities for Commission staff who are resident in Belgium, coverage is patchy and is not well understood (or known) by Commission staff with a disability. A recent conference organised by DG HR was a good first step but ASDEC remains concerned that rather than working toward a holistic approach, the Commission is avoiding taking on its social protection responsibilities by simply pointing to other entities which can “fill the gaps”.

Reasonable accommodation

It is important to keep in mind two fundamental points about ‘reasonable accommodation’:

- First of all, reasonable accommodation refers to the range of measures that can be put in place to address the specific needs of staff with a disability. Its purpose is to allow such staff to do their work in the best conditions possible. Such accommodations should not be seen as a ‘perk’, or as ‘special treatment’.
- 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.

ASDEC strongly welcomes the Ombudsman’s statement “*As regards reasonable accommodation provided to its own staff, the Commission should review its current rules adopted in 2004, in the light of the provisions of the UNCRPD which apply since 2011.*”). Already during *ad hoc* meetings organised by DG HR in 2015, representatives of staff with a disability flagged the need to update the 2004 Decision on Reasonable Accommodation.

It appears from a recent application of the Decision (information from one of our members), that DG HR continues to apply the decision by requiring Medical Service involvement in all requests for reasonable accommodation in the workplace. For ergonomic equipment provided by DIGIT, for example, the request cannot be submitted in the new MyIT application without a letter of authorisation from the Medical Service, even for catalogue items. There does not appear to have been any consultation with staff with a disability during the development of this new (compulsory) tool.

The ‘reasonable accommodation’ procedure is not well defined and it is not easy for staff to work out what they need to do in order to be granted a reasonable accommodation. This is especially difficult for staff who develop a serious health condition during their career, since they generally will not have a national recognition of the disability, may not know how to apply for it and indeed may feel they do not need it while they are still working.

The starting point for a review of 'reasonable accommodation' might be to map out the existing workflows to see who does what, when and why; and highlight gaps and failures in the procedure. It would also be useful to review what we know about the use made of 'soft' accommodations – for example job redesign, flexible hours; or of high cost inputs such as someone being supported by an assistant in the workplace.

Working time can also be an issue for some staff with a disability, because of the need to attend regular medical appointment and/or therapy sessions, especially different forms of physiotherapy; or because it may take longer to do specific tasks, due to fatigue. Some areas where staff with a disability would benefit from a more flexible approach, in line with the spirit of the reasonable accommodation guidance, are:

- Greater flexibility of the rules for medical part-time (MPT) both in terms of its duration and percentage. MPT is currently limited to 3 + 3 months, which is not suited to the needs of staff with permanent disabilities and degenerative conditions going beyond 6 months. Moreover, MPT is only possible at 50% - for some staff the possibility to work at a higher percentage while not working full-time would facilitate a workable balance between accommodating their disability-related situation while contributing to their full potential in the workplace;
- Allowing attendance at medical appointments and regular essential therapy sessions during working hours;
- Reasonable accommodations based on Job redesign to remove non-essential elements, agreed re-assignments;
- Retaining specific accommodations related to work organization when moving jobs.

The review could look into how much use is made of these measures and how far they contribute to the obligation to support the career progression of staff with a disability without discrimination. The role of Heads of Unit in making decisions on reasonable accommodation is not formalised anywhere and requests for clarification from DG HR on this issue have not been answered. Situating the decision about reasonable accommodation with the direct line manager of a staff member with a disability means that an inconsistent approach to reasonable accommodation will be implemented across the Commission and staff with a disability will not be treated equally. Heads of Unit (and staff members with a disability) may find themselves in a difficult situation where such accommodations may be perceived as not being fully in the interest of the Unit.

Where line managers alone decide on reasonable accommodation, it is most likely that service needs will dominate rather than the legitimate interest of the disabled colleague. Decisions on reasonable accommodation are, however, not subject and subordinate of "service interests. Consequently, such decisions should be attributed to a third party independent both of the service where the official works, and from the Medical Service. s. i.e. with disability experts outside the Medical Service mentioned and promised by the Commission since 2003, but never recruited.

Any assessment of these issues by the Commission should imperatively include consultation of staff with a disability.

Suggestion 6:

There appear to be two different procedures relating to the recognition of disability – under JSIS for the reimbursement of disability-related costs and as regards children with a disability and the granting of a double-child allowance – this is unacceptable and incoherent. In line with earlier remarks, recognition of disability should be compatible with the social model of disability.

Suggestion 7:

ASDEC welcomes disability-related awareness-raising and training opportunities for Commission staff. Such training is an important and valuable initiative to ensure an informed, respectful and sensitive approach to disability. Unfortunately, it seems that the number of participants on the formal one-day training course has been woefully low, with several sessions cancelled due to low registrations in 2017. During 2017, the courses were delivered by an external consultant with no DG HR expert presence to provide the context and explain how the provisions apply in practice.

ASDEC considers that the Commission's formal training on disability needs a more targeted approach for different interested parties, and should be complemented with shorter information and awareness-raising sessions on different aspects of disability. Participation in such trainings should be made mandatory for targeted groups, such as new managers, current managers who have staff with a disability under their responsibility, and staff working in the context of the Commission social protection schemes and JSIS, those working in HR functions.

6. Consultation with interested parties (Ombudsman suggestions 8 – 9)

ASDEC is concerned about the lack of structured consultation between the Commission administration and our association to date – in general on matters related to disability and specifically on the JSIS and its implementing provisions.

As noted in Section 1 of this response, DG HR encouraged the establishment of ASDEC precisely in order to have an interlocuteur for the regular consultation recommended under the UNCRPD, and members have had informal contact with DG HR during 2017. There are no arrangements for regular contact in place at present, and no effort so far to establish agreed priority areas aligning the interests of ASDEC members with the Commission's own agenda.

ASDEC was invited to a number of general introductory meetings with DG HR, OIB and the PMO during 2017. However, ASDEC have not been consulted directly and in a formal way on any document, policy, or initiative being developed during that time by the Commission. Specifically, we were not consulted by DG HR on the Commission's Diversity and Inclusion Communication (July 2017) despite Commissioner Oettinger's promise to us in March 2017 for a one-month consultation period for stakeholders. We were invited late June 2017 by the Commissioner's Cabinet to a last-minute drafting meeting at which we were informed that we would be further consulted.

We have not received a response to our letter to Commissioner Oettinger dated November 2017 giving comments on the Diversity and Inclusion Communication, in which we also provided an update on progress with establishing ASDEC. We have had no exchange with the administration on the action plan referred to in the Communication. We were invited by the Diversity Adviser to meetings with OIB and PMO with no clear agenda. We were not consulted on the event organised by DG HR

on the occasion of the International Day of Persons with Disabilities (in December 2017) at which Commission Oettinger spoke. We were invited about a week before to attend. We were also not consulted by PMO on the organisation of the event organised a week later on the Belgian federal and regional social protection benefits that may be available to EU officials, and while we were mentioned as being present, the opportunity for ASDEC and the parents EC Disability Support Group was dropped due to an overrun on the agenda timing.

Following the UN Committee's observations (in particular, in relation to the JSIS) there was talk of setting up an interinstitutional working group --which would include staff with a disability-- to assess the current situation and to recommend a way forward. The Commission has also committed to establishing a working group involving staff with a disability. However, to date, no such working group has been established (to our knowledge).

While there are areas of overlap between the group of parents with dependents with a disability (the EC Disability Support Group) and ASDEC, the administration should note that our respective interests are overall different and distinct (hence the need for two separate groups).

ASDEC considers that a formal and regular dialogue with our association needs to be established with the Commission and that, in line with the fundamental principles of the UN CRPD, where policies that concern staff with a disability are being formulated, ASDEC should be systematically consulted.

Finally, no staff member with a disability sits formally on the Local Staff Committee. To our knowledge, not a single colleague with a disability was presented or invited to sit as a candidate for the current Staff Committee elections. It would be desirable to change the Staff Regulations so that a) each and every Staff Committee needs to have at least one colleague with a disability in its body. Furthermore, establishing improving the representation of disabled Commission officials either through a formal representative role or by the creation of a statutory body of which they could be members, would ensure proper consultation of staff with a disability.

7. Conclusion

In conclusion, ASDEC considers that a holistic approach to the reimbursement of all disability-related costs, including the costs of reasonable accommodation, is necessary. Moreover, a non-medical, human rights approach to disability should be the fundamental basis of such an approach.

Today the fragmentation of disability-related medical costs, disability-related non-medical equipment costs and disability-related reasonable accommodation costs results in non-transparent, burdensome and unequal treatment (between staff with a disability themselves, between staff with a disability and children/dependents with a disability).

A holistic approach (which must also be inter-institutional) will also inevitably require that the appropriate financial resources be allocated and secured by the EU institutions – the current ad hoc budgetary approach only adds to the uncertainty of the process.

Finally, the Commission needs to reconsider and clarify its approach to reasonable accommodation.

What is most urgently needed is dialogue and consultation.

ASDEC looks forward to the follow-up by the Ombudsman in the context of its own-initiative enquiry into the JSIS and remains available to discuss any of the issues raised in this contribution.