CONSEIL DE L'EUROPE
COUNCIL OF EUROPE

TRIBUNAL ADMINISTRATIF
ADMINISTRATIVE TRIBUNAL

Appeals Nos. 361-365/2006 and 368/2006 (Melina BABOCSAY and others v. Secretary General)

The Administrative Tribunal, composed of:

Ms Elisabeth PALM, Chair,
Mr Angelo CLARIZIA,
Mr Hans G. KNITEL, Judges,

assisted by:

Mr Sergio SANSOTTA, Registrar,

has delivered the following decision after due deliberation.

PROCEEDINGS

1. The Tribunal has six appeals before it, submitted by:

- Ms Mélina BABOCSAY,	Appeal No. 361/2006, lodged on 31 May 2006 and registered on 31 May 2006,
- Mr Jonathan L. SHARPE,	Appeal No. 362/2006, lodged on 1 June 2006 and registered on 1 June 2006,
- Ms Paola LUCIANO-PALMIERI,	Appeal No. 363/2006, lodged on 2 June 2006 and registered on 7 June 2006,
- Mr Gianfranco ALBERELLI,	Appeal No. 364/2006, lodged on 9 June 2006 and registered on 9 June 2006,
- Mr Frank STEKETEE,	Appeal No. 365/2006, lodged on 9 June 2006 and registered on 9 June 2006,
- Mr Marc BAECHEL,	Appeal No. 368/2006, lodged on 20 June 2006 and registered on 20 June 2006.

2. On 19 July 2006, Mr J.-P. Cuny, counsel for the appellants, filed supplementary memorials in the appeals.

3. On 21 June 2006, the Secretary General submitted his observations on the appeals.

4. On 30 October 2006, the appellants filed a memorial in reply concerning the appeals.

5. As the Chair had authorised the Staff Committee of the Council of Europe to intervene in the proceedings (Article 10 of the Tribunal's Statute), on 10 January 2007, the Staff Committee submitted written observations.

6. The public hearing in the appeals took place in the hearing room of the Administrative Tribunal, Strasbourg, on 19 January 2007. The appellants were represented by Mr J.-P. Cuny and the Secretary General by Mr P. Titiun, principal administrative officer in the Legal Advice Department, Directorate General I - Legal Affairs, assisted by Ms C. Olsen and Ms M. Junker-Schreckenberg, respectively administrative officer and assistant in the same department. The hearing likewise dealt with Appeals Nos 370-378/2006 - Charreton and others, which are concerned with issues linked to those raised in the present appeals.

The Tribunal concluded the hearing by inviting the Staff Committee representative to speak. She said that she had nothing to add.

7. After the hearing, at the Tribunal's request, the appellants supplied information on how the other Co-ordinated Organisations had dealt with the issue raised in the present dispute. The Secretary General was able to submit comments (see paragraph 21 below).

THE FACTS

8. When the appeals were lodged, the appellants were either retired permanent staff of the Organisation (Ms Babocsay and Mr Sharpe) or serving permanent staff (the other appellants).

9. They lodged their appeals to challenge the Secretary General's decision to refuse them any retroactive correction of their pensions or salaries for the years 2003, 2004 and 2005.

10. The relevant facts may be summed up as follows.

I. PROCEDURE FOR SETTING REMUNERATION

11. Council of Europe staff are entitled to remuneration in accordance with Article 41 of the Staff Regulations and the Regulations governing Staff Salaries and Allowances (Appendix IV to the Staff Regulations). The salary scales are fixed by the Committee of Ministers and appended to the Committee of Ministers resolution setting the levels of remuneration. This remuneration-setting is part of an adjustment procedure also involving other international organisations (the "Co-ordinated Organisations"). At the time of the facts in dispute it took place on a three-yearly basis.

The scales are also used to calculate the pensions of the Organisation's retired staff.

12. Under the three-yearly review of Council of Europe staff salaries taking effect on 1 January 2003, the Committee of Ministers, at its 818th meeting (27 November 2002), approved the recommendations in the 139th report dated 15 July 2002 of the Co-ordinating Committee on Remuneration (CCR), together with the remuneration scales, with effect from 1 January 2003.

On this occasion a new adjustment procedure was established. It contained three major innovations concerning calculation of the reference index (used to determine the required salary adjustment). One of the innovations was that, to calculate the reference index, the CCR was to take into account "all other financial and non-financial changes to national civil service terms and conditions". This innovation was introduced in order to "capture more accurately the complete contents of the salary package" (139th report, paragraph 3.3.).

II. APPLICATION OF THE ADJUSTMENT PROCEDURE AT ISSUE

13. When the method was applied the French authorities stated – provisionally – that working hours of French civil servants had fallen from 36.72 to 35 per week. The effect of this was a 0.94% increase in the reference index.

14. No data (financial or non-financial) on their remuneration were forthcoming for 2004 and 2005.

15. However, when the adjustment for 2006 was under discussion, it was necessary to consider a matter regarding the calculation method for non-financial remuneration in the German civil service.

At this point it emerged that the figures for the statutory reduction in working hours in the French civil service provided in 2003 should have shown that working hours had fallen from 39 hours to 35 hours a week.

It was evident that the reference index had been underestimated and should have been 2.18% instead of 0.94%.

16. The final French figures were taken into the reckoning for 2006 and subsequent years.

However, with regard to correcting the figures for the preceding years (2003, 2004 and 2005), the CCR asked each Co-ordinated Organisation to "draw the consequences of the correction of this figure according to its specific situation" (paragraph 2.4 of the 168th report – Annual adjustment of remuneration of the staff of the Co-ordinated Organisations at 1 January 2006):

> "2.4 In light of the provisional nature of the French figure the CCR agreed that it should be re-examined. Recognising the need to be consistent, the Committee decided to follow the same statutory approach adopted in respect of the increase in the German working hours (see paragraph 2.2 above) and, consequently, that the reduction in the working hours in the French national civil service from 39 hours to 35 hours in compliance with the Decree publishing this change, was equivalent to an increase in the reference index at 1 January 2003 of +2.18% instead of +0.94% (i.e. a +1.2% differential). The CCR invites each Council to draw the consequences of the correction of this figure according to its specific situation, in the employment conditions of its staff."

However, that invitation does not feature in the "Recommendation" section of the report. This reads:

> "The Co-ordinating Committee on Remuneration recommends to Councils:
>
> a. to approve, subject to the provisions of Article 8 as adopted by five Organisations, the salary scales at 1 January 2006 mentioned in paragraph 2 above resulting from the application of the adjustment indices set out in Annex 2, column 3 (cf. attached tables by country in Annex 5);
>
> b. to take note that the Secretaries/Directors General will consider, in the light of the situation faced by their individual Organisations, the increase in the working hours in the German civil service and the correction of the impact of the reduction in the working hours in the French civil service in 2002 which, when combined, give a +0.3% increase in the reference index (see Annex 2). They will take these into account in the conditions of service of their staff and will take appropriate measures in accordance with the normal procedures;
>
> c. to approve and to implement, with effect at 1 January 2006, the amounts of allowances fixed in absolute value, adjusted in accordance with the procedure, set out in Annex 6 (Table II);
>
> d. to note that, in pursuance of Article 36 of the 132nd Report by the CCR, pensions will be adjusted in the same proportions and at the same date as the salary of staff in relation to which they are calculated;
>
> e. to note that, in accordance with the interpretation given to paragraph 3 of the 34th Report by the CCG [CCG (65)5] dated 25 October 1965, at its 77th Session on 29 June 1966 [cf. CCG/M(66)6], the salary of auxiliary staff serving in the Co-ordinated Organisations will be adjusted in the same proportions as that of permanent staff."

III. THE ORIGINS OF THE DISPUTE

17. On 16 January 2006, the Chair of the Council of Europe Staff Committee wrote as follows to the Secretary General (original version):

> "Dear Secretary General,
>
> I refer to memorandum DGAL 708 of 20 December of the Director General of Administration and Logistics, in which he informs the Staff Committee of your intentions with regard to the implementation of the recommendation of the CCR as laid out in its 168th Report.
>
> **As to the substance of the proposal**
>
> As you know, three years ago, the introduction of the 35-hour week in France resulted in an increase in the reference index (of 0.94%, according to the provisional figures available at the time). In accepting your predecessor's recommendation that the resulting adjustment at 1 January 2003 be awarded in non-financial terms, the staff of the Council of Europe made a major concession (on this, see also the points on procedure below), which continues to have far-reaching consequences for staff. This is all the more true for retired staff, who receive no benefit at all from the additional annual leave awarded to serving staff, and who continue to suffer direct discrimination as a result.
>
> Three years later, staff cannot reasonably be expected to be prepared to make a further concession of this sort.
>
> The very serious consequences for retired staff aside, the Committee must emphasise that the aim of staff is not to work less. The staff is already sufficiently the target for criticism by the Ministers' Deputies to wish to avoid any further accusations of the "overpaid and underworked" variety. Despite this type of unsubstantiated attack, staff are ready and willing to work hard – and indeed, as their ever-increasing workloads bear witness, they do so. Reducing the staff budget in order to increase the budget for activities is, however, not a lasting solution. Indeed, the spiral of increasing tasks and reducing staff – which has been compounded in 2006 by the request that departments find 2% efficiency savings and

by the additional administrative burdens imposed by quarterly budget reporting – has brought many departments virtually to breaking point. And, once again, such a solution is grossly unfair to retired staff.

The Staff Committee therefore cannot give a favourable response to your proposal.

As to the procedure to be followed

The Committee must also emphasise that the salary adjustment method currently in force provides that changes in non-financial elements – in this case, variations in working hours in the national civil services of the reference countries – have a *direct* impact on the reference index: in other words, that the end result should be expressed in terms of financial remuneration. Any other solution – such as that adopted for the salary adjustment of 1 January 2003 and that which you propose for 1 January 2006 – is contrary to both the letter and the spirit of the method.

Accordingly, your proposal amounts to a derogation from the method in force. Yet, according to this method, derogations can only be made in the context of Article 8 of the 139th Report of the CCR ("Affordability"). We note that you have not invoked this provision and that, *a fortiori*, neither its substantive nor its procedural conditions have been observed.

It should be recalled that the derogation to the method that was applied for the adjustment of 1 January 2003 was based on the **agreement** of staff representatives. Indeed, in accordance with the case-law of our Administrative Tribunal (decision in the case of *Stevens and others*), the agreement of staff representatives following "negotiations" is a necessary condition that must be fulfilled before a subjective right of staff can be waived. And there is no doubt that observing all the elements of a salary adjustment method constitutes – as international case-law has indeed repeatedly emphasised – a subjective right of all staff.

According to the Staff Committee's most recent information, at least one Co-ordinated Organisation (the European Centre for Medium-Range Weather Forecasts) has translated the full adjustment to which staff are entitled into monetary terms, and another (the OECD) is close to doing so also. Moreover, the solution adopted in the Council of Europe must be in conformity with the legal rules and precedents specific to our Organisation, outlined above.

The Staff Committee considers that it should have been asked not merely for its "opinion" under Article 6, paragraph 1 of Appendix I to the Staff Regulations, but for its agreement.

Conclusion

In the light of the foregoing, at this stage in discussions, the Staff Committee cannot give a favourable response to your proposal. Indeed it must go further, and formally request that the salary adjustment at 1 January 2006 be applied in full, ie that staff remuneration be adjusted by 2%.

The Committee considers it highly desirable to reach agreement with you on the salary adjustment for 2006, and therefore would like to propose that staff representatives meet as soon as possible with you and/or your representatives to undertake an in-depth examination not only of the concerns raised by your proposal as to the means by which the 0.3% of non-monetary elements should be taken into account, but also of the consequences of the correction of the non-monetary elements of the 2003 adjustment (see Appendix). It also formally requests that, until such time as an agreement is reached, the question of the salary adjustment for 2006 not be put to the Ministers' Deputies.
Yours faithfully,

(…)

Appendix

I. Situation of retired staff

In addition to the observations made above, the Staff Committee must underline strongly that any translation of salary adjustment into non-monetary terms – in the present instance, in the form of

additional leave – inevitably penalises retired staff, who receive no benefit from such a measure. This clearly constitutes unjustified discrimination against retired staff.

Retired staff were already penalised in 2003 by the award in non-monetary terms (in the form of two additional days' leave) of a salary increase of 0.94%. The Staff Committee cannot accept their being penalised a second time in this manner. It therefore insists – taking account also of the provisions and the spirit of the method outlined in its letter – that the entire salary adjustment for 2006 (1.7% + 0.3% = 2%) must be awarded to all staff – serving or retired – in monetary terms.

II. Consequences of the correction of the non-pecuniary elements of the 2003 adjustment (reduction of French working hours from 39 to 35 hours)

The Committee wishes to emphasise in addition that, whatever agreement is reached for 2006, all staff have been deprived for three years (from 2003 to 2005) of more than half of the benefits of the reduction in French working hours from 39 to 35 hours.

They are therefore entitled to compensation for the benefits lost over three years. For your information, the Committee has translated this compensation into the equivalent in holiday terms (since this was the form of remuneration chosen at the time) of what should have been awarded in 2003, 2004 and 2005. In monetary terms the compensation amounts to a back pay in salary of the percentage shown (3.60% in total for the three years).

Provisional figure for non-monetary elements (2003)		0.94%		
New figure for non-monetary elements (2006)		2.18%		
Difference		1.24%	rounded down to 1,2 %	
Retroactive non-monetary adjustment for one year	245 working days per year	1.20%	2.94	days
Retroactive non-monetary adjustment for 2003-2004-2005	times 3	3.60%	8.82	days

III. Calculations made by DGAL for 2006

The Committee wishes to underline – again, for information purposes only at this stage – that there is an error in DGAL's calculations as to the number of additional days' leave to which staff would be entitled were the salary increase of 0.3% due in 2006 for non-monetary elements translated into this form (see table below).

It recalls, however, its insistence that this increase must be awarded in monetary terms.

	245 days worked in 2006			
2006	245	0.30%	0.735	days
2003	245	0.94%	2.303	days
total		3.038		days".

18. On 21 February 2006, the Secretary General wrote to the Chair of the Staff Committee informing her that at its meeting on 9 March 2006 the Committee of Ministers Rapporteur

Group on Administrative and Budgetary Questions (GR-AB) would be considering the question of pay adjustment for 2006.

In his letter the Secretary General gave the Chair of the Staff Committee his reply on the legal issues which she had raised in her letter of 16 January 2006 concerning the 2006 pay adjustment.

19. He referred to four matters. One of these was "retroactive compensation" in respect of years 2003-2005. He stated:

> "The examination of the retroactive effect of the correction of the non-monetary elements for the years 2003 to 2005 was not retained by the CCR in the recommendation. As a result, I am advised that I am not obliged to propose retroactive compensation under the form of extra leave days or monetary compensation. Whatever may be my personal feelings, the Organisation simply cannot afford it in our present financial circumstances."

IV. THE ADMINISTRATIVE COMPLAINTS

20. On various dates from 20 to 22 March 2006, the appellants lodged administrative complaints against the Secretary General's decision of 21 February 2006 – contained in his letter of that date – not to consider any measure of retroactive rectification.

All of the complaints were worded as follows (translation):

> "I respectfully request that you annul your decision against taking any measure to correct retroactively the adjustments to my pension resulting from application of the salary adjustment method currently in force.
>
> As you will be aware, every retired staff member is entitled to have the adjustment method correctly and fully applied. The point should be made that the CCR's recommendations in its 143rd report, on adjustment at 1 January 2003, were based on provisional figures pending explanations from the French authorities regarding the precise reduction in working hours in the French civil service.
>
> Those figures were rectified and have thus become final, as indicated in the CCR's 168th report concerning adjustment of remuneration at 1 January 2006. It transpires that the reduction in working hours in the French civil service was actually 10.26% instead of the 4.64% provisionally used for the adjustments at 1 January 2003, 2004 and 2005, the impact on the reference index being a 2.18% increase instead of a 0.94% one.
>
> Whatever decision the Committee of Ministers takes concerning the adjustment at 1 January 2006, it is essential, in order to comply with the rules in force (the CCR's 139th report), that I be granted a monetary correction to offset the loss incurred in the three years in question. The correction should be 1.24% for each of those years (2003, 2004, 2005).
>
> Your refusal, in your letter of 21 February 2006 to the Chair of the Staff Committee, to entertain any retroactive rectification is based on misapprehensions. Chiefly, you take the view that you are not obliged to make me any retroactive correction because the CCR did not make any recommendation to that effect to the Councils of the Co-ordinated Organisations. I would point out in this connection that the Organisation has precise, arithmetical obligations towards its serving and retired staff on the basis of the method in force (here, the 139th report as adopted by the Committee of Ministers) and not on the basis of the CCR's recommendations, which are in no way prerequisite to the Committee of Ministers' honouring its obligations.
>
> According to your contention, if a reference country or reference countries systematically provided "provisional" data on purchasing power trends in their civil services, it would be permissible for the annually adopted index quite simply to disregard the method, which would then cease to have any objectivity. The paradoxical effects of that position cannot escape you.

Secondly you make out that the Organisation "simply cannot afford it in our present financial circumstances". That assertion is not only unsupported by any reasons but also completely ignores the procedural and substantive requirements with which any exception to the method must comply.

For these reasons I trust that you will reverse your decision and consider concrete steps to give me the retroactive rectification I am due."

21. The Secretary General dismissed all the administrative complaints on various dates between 12 and 24 April 2006.

His decisions were worded as follows (translation):

"You request the annulment of the decision not to take any measure to correct retroactively your remuneration adjustments resulting from application of the salary adjustment method currently in force and you request a monetary correction to offset the loss you allegedly sustained in respect of years 2003, 2004 et 2005. You base your request on application of the remuneration adjustment method laid down in the 139th report of the Co-ordinating Committee on Remuneration (CCR); on the fact that the figures applied on the basis of the CCR's 143rd report were provisional; and on the final figures established in the CCR's 168th report.

According to your analysis, each staff member or retired staff member has an individual entitlement to application of the adjustment method; adjustments should be made in monetary terms; and they necessitate a 1,24% correction in respect of each of years 2003, 2004 and 2005. The CCR's recommendations, you say, are in no way prerequisite to the Committee of Ministers' honouring its obligations.

As you know, the Council of Europe is one of the Co-ordinated Organisations, which share a co-ordinated remuneration system. In that context, on 8 July 2004, the Council of Europe Committee of Ministers adopted Regulations concerning the Co-ordination System (Committee of Ministers (2004)14). The regulations contain the following provisions on pay and pension adjustment:

Article 1

Scope of Co-ordination

(a) The object of the co-ordination system is to provide recommendations to the governing bodies of the Co-ordinated Organisations, in accordance with the provisions of these Regulations, concerning:

(i) Basic salary scales, and the method of their adjustment, for all categories of staff and for all countries where there are active staff or recipients of a pension;

(…)

Article 8

Notification and implementation

(a) The Chairperson of the CCR shall notify the Secretaries/Directors-General of all reports, recommendations and advisory opinions. The Secretaries/Directors-General shall transmit these reports, recommendations or advisory opinions, to the Governing body of their Organisations, as soon as possible.

(b) The Governing body of each Co-ordinated Organisation shall decide on the reports, recommendations and advisory opinions made to it by the CCR.

(c) The Secretary/Director-General of each Organisation shall be responsible for the implementation of the decisions.'

Under these provisions it is the Coordinating Committee on Remuneration (CCR) which first puts forward a proposal on adoption of a method, then implements the method and communicates the results to the organisations concerned so that they can take them into account and adjust staff remuneration accordingly.

The method currently in force is the one advocated in the CCR's 139th report, the method which the Council of Europe Committee of Ministers adopted on 27 November 2002 (Committee of Ministers (2002)138).

The figures on which you base your complaint derive from the CCR's 168th report, based on the application of the method in force, as stated in the paragraph 212 of the report. Its recommendations to the member organisations are as follows:

4. Recommendation

The Co-ordinating Committee on Remuneration recommends to Councils:

a. to approve, subject to the provisions of Article 8 as adopted by five Organisations, the salary scales at 1 January 2006 mentioned in paragraph 2 above resulting from the application of the adjustment indices set out in Annex 2, column 3 (cf. attached tables by country in Annex 5);

b. to take note that the Secretaries/Directors General will consider, in the light of the situation faced by their individual Organisations, the increase in the working hours in the German civil service and the correction of the impact of the reduction in the working hours in the French civil service in 2002 which, when combined, give a +0.3% increase in the reference index (see Annex 2). They will take these into account in the conditions of service of their staff and will take appropriate measures in accordance with the normal procedures;

c. to approve and to implement, with effect at 1 January 2006, the amounts of allowances fixed in absolute value, adjusted in accordance with the procedure, set out in Annex 6 (Table II);

d. to note that, in pursuance of Article 36 of the 132nd Report by the CCR, pensions will be adjusted in the same proportions and at the same date as the salary of staff in relation to which they are calculated;

e. to note that, in accordance with the interpretation given to paragraph 3 of the 34th Report by the CCG [CCG(65)5] dated 25 October 1965, at its 77th Session on 29 June 1966 [cf. CCG/M(66)6], the salary of auxiliary staff serving in the Co-ordinated Organisations will be adjusted in the same proportions as that of permanent staff.'

Retroactiveness of the adjustment is nowhere mentioned in the recommendations, and it is not for the Secretary General, given the Regulation concerning the Coordination System, to suggest, of his own motion, that the Committee of Ministers make changes to the measures recommended by the CCR.

In conclusion, your administrative complaint is to be considered ill-founded and dismissed. Under Article 60 of the Staff Regulations it is open to you to challenge this decision in writing before the Administrative Tribunal within 60 days of being notified of it."

The appellants lodged their appeals with the Tribunal against the dismissal of their administrative complaints within the 60-day period laid down in Article 60 of the Staff Regulations, on the dates stated in paragraph 1 above.

V. DECISIONS OF THE OTHER CO-ORDINATED ORGANISATIONS

22. According to the information provided by the parties the situation at the other Co-ordinated Organisations concerning an adjustment with retroactive effect in respect of years 2003-2005 may be summed up as follows:

A. European Centre for Medium-Range Weather Forecasts (ECMWF)

The Director General of the Centre consulted the Staff Committee on the question of rectifying the scales. The Staff Committee held a referendum in which the staff were given a choice between the financial compensation and compensation in the form of additional days' leave.

Most of the staff opted for compensation in the form of additional days' leave.

In the light of the consultation with the Staff Committee the Centre's Council took the following decision:

- grant of 7.5 days' extra leave to serving staff (2.5 days for each of 2007, 2008 and 2009);

- grant of financial compensation to retired staff.

In addition, the Council decided to grant non-financial compensation to former staff who had been in service during the 2003-2005 period. For these staff, compensation was calculated according to the relevant length of service in the individual case.

B. European Space Agency (ESA)

The ESA staff representatives were invited to negotiations with the Director General. The staff representatives expressly accepted non-financial compensation – 7.5 days' extra leave to be taken in 2006 (document ESA/AF (2006)22, page 6). A proposal to that effect was submitted to the Council, which approved it.

C. Organisation for Economic Cooperation and Development (OECD)

For various reasons to do with the political context at OECD, the Staff Committee decided to refrain from requesting any form of rectification of the scales for the period in question. It should be pointed out, for information, that in 2003, and for that year alone, the OECD Council decided to apply an ad hoc non-co-ordinated method to that organisation.

D. North Atlantic Treaty Organisation (NATO)

The appellants stated that scale rectification was currently central to discussions in the relevant NATO bodies such as the AGFC (Advisory Group of Financial Counsellors, an internal body of the Council which performs the same role as the GR-AB in the Council of Europe). Of relevance here was the letter dated 15 January 2007 from the Nato Secretary General, Mr Jaap de Hoop Scheffer, to the Chair of the Liaison Committee (the committee on which are represented the 35 or so Nato agencies and headquarters in Europe and worldwide). It contains the following passage: "*The [Assistant Secretary General for] Executive Management has expressed the position that there are strong legal arguments that compensation should be giver retroactively and that monetary compensation is affordable if it is phased over a period*".

For his part the Secretary General of the Council of Europe stated in his comments that the relevant working party had said there was "no legal obligation to report". For that reason no particular measure had been recommended.

E. Western European Union (WEU)

The appellants stated that, on pay and pension adjustments, the WEU Council fell in with the relevant Nato decisions. It had accordingly not taken any step to rectify the scales. That was liable to change if Nato reviewed its position in the matter.

The Secretary General pointed out that WEU was a sovereign organisation and therefore free to follow Nato's line or not. He disagreed with the appellants: in 2003 Nato had granted 2 days' leave in respect of the 0.94% increase as non-financial compensation for the shorter working hours in the French civil service (as the Council of Europe and ESA had also done), whereas WEU had granted nothing. Further, at present there was no discussion about any rectification in respect of the 2003-2005 period.

THE LAW

23. The six appellants ask the Tribunal to annul the Secretary General's decision of 21 February 2006 in which he refused any measure of retroactive pay or pension compensation in respect of years 2003, 2004 or 2005. They also submit a total claim of 7 500€ in costs and expenses of the six appeals.

The Secretary General asks the Tribunal to declare the appeals unfounded and dismiss them.

I. JOINDER OF THE APPEALS

24. As the six appeals are closely connected the Administrative Tribunal hereby orders their joinder in accordance with Rule 14 of its Rules of Procedure.

II. THE PARTIES' ARGUMENTS

A. The appellants

25. The six appellants advance two grounds of appeal: contravention of the adjustment method in force and breach of the general legal principles of *legem patere quam ipse fecisti*, the rule of law, legitimate expectation and good faith.

26. As regards the first of these grounds, the appellants point out that, under the Tribunal's case-law, the methods of pay adjustment, once adopted by the Committee of Ministers, have regulatory force and thus place obligations on the Organisation and create entitlements of each serving or retired staff member. That case-law, they maintain, is confirmed by that of the International Labour Organisation Administrative Tribunal (Judgment No.1265 of 14 July 1993, Berlioz and others v. WIPO). European Union case-law, they say, tends in the same direction.

27. Noting that there is no dispute between the parties as to the correction of the figures in respect of the shorter working hours in the French civil service and its impact on the reference index, the appellants maintain that the Secretary General's refusal is based on his contention that, in the absence of an express recommendation from the CCR, it is not for him to put proposals to the Committee of Ministers of his own motion concerning changes to measures recommended by the CCR. They maintain that that is a misinterpretation in that there is no explicit provision making a Committee of Ministers decision conditional on existence of a CCR recommendation. In addition, they argue, the method creates an obligation to adjust remuneration and the point of the recommendations is to quantify the obligation. The 168th report (paragraph 2.4) undoubtedly asked the Committee of Ministers to "draw the consequences of the correction" and it was not possible to disregard that passage even in the absence of any express recommendation that that be done. Lastly it was clear from the subject matter and purpose of the 139th report that there were adjustments to be made on the basis of known, detailed figures.

28. In the appellants' submission, it follows that the Secretary General should have set in motion appropriate procedure in the Committee of Ministers, preceded by discussions with the Staff Committee, in order to rectify the situation. Lastly, no reasons had been given for his reliance on budgetary affordability and that reliance took no account whatever of the procedural and substantive requirements which all exceptions to the method had to meet (see Article 8 of the method).

29. With regard to their second ground of appeal, the appellants note at the outset that, under the general principle of *legem patere quam ipse fecisti*, the Committee of Ministers is bound by the obligations arising from its adoption of the method: all authorities are required to abide by the decisions which they themselves take. In the present case, in adopting the 139th report, the Committee of Ministers decided that it would adjust staff remuneration and pension according to an objective, mathematical method, while reserving the possibility – limited substantively and procedurally – of derogating from implementing the method, wholly or in part (see Article 8 of the report). In the present case the Committee of Ministers is in breach of the method which it itself laid down: the adjustments for the 2003-2005 period were made on the basis of provisional figures whose effect was to produce an index lower than the one the method provided for, and by thus derogating from strict and rigorous application of the method the Committee of Ministers disregarded the formal and substantive requirements of Article 8.

30. The appellants add that infringement of these two general principles is compounded by breach of the principles of legitimate expectation and good faith. They refer here to the Ausems and others decision (ATCE (formerly ABCE), Appeals Nos 133-145/1986, Ausems and others, decision of 3 August 1987).

B. The Secretary General

31. The Secretary General notes that the appellants base their claims on figures deriving from the 168th CCR report, drawn up under the method in force. He adds that there is no mention of retroactiveness of the adjustment in the report's recommendations. Consequently it is not for the Secretary General, under the rules governing the Co-ordination system, to make proposals to the Committee of Ministers of his own motion concerning alterations to measures recommended by the CCR. Further, the provisional aspect to the figures supplied by

the French delegation is referred to in a mere footnote to the 143rd report and the conclusions and proposals make no express mention of any subsequent retroactive adjustment in the light of the final figures.

The Secretary General adds that any decision concerning a retroactive readjustment lies, under Article 16 of the Statute of the Council of Europe, with the Committee of Ministers alone further to a proposal from the Secretary General or the Committee of Ministers itself, and cannot be taken automatically or by the Secretary General on his own.

In the Secretary General's view the Organisation has not infringed the CCR's recommendations as set out in the 143rd and 168th reports: those recommendations left it to the Organisation to decide, in the light of its situation, how the changes in working hours at national level might be taken into account in its staff's employment conditions.

32. The Secretary General maintains that the decision challenged is not the decision not to award a retroactive rectification in monetary terms, a decision which is not his to take, but the decision not to put a proposal to the Committee of Ministers that it decide to award the staff such rectification.

In this connection he says firstly that he is not legally bound to make such a rectification proposal and secondly that, in the circumstances of the case, he is not mistaken in not making such a proposal. In his view, under Article 8 (a) of the Regulations concerning the Co-ordination System, his role is to forward the reports without commenting on them or submitting any additions with them. In addition, the Committee of Ministers formally takes a decision on the CCR proposal and to keep to both the spirit and letter of Article 8 (b) of the Regulations concerning the Co-ordination System the Committee of Ministers cannot take a decision without a proposal from the CCR. As, in the 168th report, the CCR does not suggest any retroactive rectification in terms of the method or its implementation, the Secretary General cannot put before the Committee of Ministers a decision it cannot take.

33. As regards general legal principles, since there was no indication in preceding decisions that such a rectification was to be anticipated, the absence of a retroactive measure is not contrary to any staff expectations. In support of this contention the Secretary General points out that the CCR itself does not suggest any such rectification in its report and that the staff's views were conveyed to the Committee of Ministers, which was thus able to take an informed decision regardless of any proposals of the Secretary General's. There is no mention of retroactiveness of the adjustment anywhere in the CCR's recommendations. Thus it is not for the Secretary General, under the Regulations on the Co-ordination System, to make a proposal to the Committee of Ministers of his own motion that it alters measures recommended by the CCR. In the light of these facts the Secretary General takes the view that his decision not to suggest any rectification did not result from any misassessment of the position.

34. In conclusion the Secretary General takes the view that he has not committed any of the alleged infringements and asks the Tribunal to declare the appeals unfounded and dismiss them.

III. THE ARGUMENTS OF THE THIRD PARTY

35. The Staff Committee points out that the remuneration-adjustment methods, once adopted, have regulatory force and place obligations on the Organisation. The 2003 adjustment was calculated on the basis of provisional figures which were to the staff's detriment and the detriment must now be made good. The Secretary General's refusal to make a proposal to that effect infringes both the method and the general legal principles on which the appellants rely. Lastly, the lack of any formal recommendation of an adjustment is no obstacle to making an adjustment as the Organisation was asked to take the necessary measures and the Secretary General's position is based on purely formal considerations.

IV. THE TRIBUNAL'S ASSESSMENT

36. The Tribunal notes at the outset that the appellants are challenging the decision of the Secretary General contained in his letter dated 21 February 2006. Thus the case differs from previous pay-adjustment disputes referred to the Tribunal in that the decision which the appellants are contesting is not an administrative measure by the Secretary General further, as part of the remuneration-adjustment process, to a decision of the Council of Europe Committee of Ministers, but a free-standing measure by the Secretary General deciding not to refer a matter to the Committee of Ministers for a decision.

The question before the Tribunal is therefore not whether the appellants are entitled or not to retroactive correction of their pay or pension increases but, more accurately, whether the Secretary General's decision is flawed by administrative error.

37. The appellants advance two grounds of appeal – contravention of the adjustment method and breach of general legal principles. They contend that the Secretary General should have set in motion appropriate procedure in the Committee of Ministers for rectifying the situation.

38. The Secretary General argues that retroactiveness of the adjustment is nowhere mentioned in the recommendations of the 168th CCR report and that it is therefore not for him, under the Regulations concerning the Co-ordination System, to put of his own motion a proposal to the Committee of Ministers for alterations to the measures recommended by the CCR.

39. The Tribunal notes that the CCR's recommendations in the 168th report have to do with pay adjustment for 2006. However it is in this context that the CCR found that the reduction in working hours in the French civil service, as taken into account in 2003, should have been from 39 to 35 hours and that the reference index had been underestimated by 1.2%. The CCR asked each of the Councils to "draw the lessons of the correction of this figure".

40. The Tribunal observes that there is no dispute between the appellants and the Secretary General – and nor was there any within the Co-ordination system – regarding the correction of the figures concerning the shorter working hours in the French civil service and their impact on the reference index.

Consequently the three-yearly adjustment for 2003-2005 was based on figures which were wrong. For the Council of Europe there therefore arises the question whether it must or need not compensate serving and retired staff retroactively to make good the mistake.

41. As this is a budgetary matter, as correctly stated by the Secretary General, it is for the Committee of Ministers to decide it (Article 16 of the Statute of the Council of Europe).

The Secretary General is responsible for organisational functioning and must put administrative and budgetary matters to the Committee of Ministers for decision.

42. In the present case the question of a correction to the compensation in respect of years 2003 to 2005 – a matter of very great importance for the Council of Europe – remains an open one on which the competent body has not taken a decision on account of the Secretary General's decision not to put the matter to the Committee of Ministers.

The Tribunal finds that the Secretary General's non-submission of the matter breaches general legal principles, in particular that of the rule of law. It follows that the Secretary General's decision of 21 February 2006 must be set aside.

43. The appellants, who enlisted the services of a lawyer, jointly claim 7,500 € in costs and expenses in respect of examination of the joined appeals. The Tribunal considers it reasonable for the Secretary General to reimburse the sum claimed (Article 11, paragraph 2 of the Statute of the Tribunal – Appendix XI to the Staff Regulations).

On these grounds,

The Administrative Tribunal:

Orders joinder of the appeals;

Declares Appeals Nos. 361-365/2006 and 368/2006 founded;

Annuls the decision of 21 February 2006;

Orders the Secretary General to reimburse the sum of 7 500 € in costs and expenses.

Delivered at Strasbourg, on 12 July 2007, the French text of the decision being authentic.

The Registrar of the Administrative Tribunal	The Chair of the Administrative Tribunal
S. SANSOTTA	E. PALM