ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT

ORGANISATION DE COOPÉRATION ET DE DÉVELOPPEMENT ÉCONOMIQUES

ADMINISTRATIVE TRIBUNAL

Judgment of the Administrative Tribunal

handed down on 30 June 2021

JUDGEMENT IN CASE No. 94

Mr AA, Mr BB, Ms CC, Ms DD, Mr EE
v.

Secretary-General

Translation (the French version constitutes the authentic text).

JUDGMENT IN CASE No. 94 OF THE ADMINISTRATIVE TRIBUNAL

Hearing held by videoconference on 14 June 2021

In Château de la Muette,

2 rue André-Pascal à Paris

The Administrative Tribunal consisted of **:**

Mrs. Louise OTIS, Chair

Mr. Pierre-François RACINE

And Mrs. Alice GUIMARAES-PUROKOSKI

with Mr. Nicolas FERRE providing Registry services.

The Tribunal heard

Mr. Giovanni Michele PALMIERI and Me Laure LEVI, counsels of the Applicants;

Mr. Auguste NGANGA-MALONGA, Senior Legal Advisor of the Organisation's Directorate for Legal Affairs, on behalf of the Secretary-General;

INTRODUCTION

1. In their application for annulment and compensation lodged with the Registry on 3 June 2020, Mr AA, Mr BB, Ms CC, Ms DD, Mr EE (hereinafter the Applicants), request both the annulment of the decision by the Secretary-General (hereinafter the Organisation) to implement the amendment of Article 36 of the Co-ordinated Pension Scheme Rules (1)[1] and the application of an identical adjustment to pensions and salaries retroactively to 1 January 2020. In the alternative, the Applicants request that the Organisation be ordered to pay a lump sum corresponding to the loss of their pension rights since 1 January 2020, taking life expectancy into account. Finally, the Applicants request that the Organisation be ordered to pay costs in the amount of 8,000 euros.

2. The Organisation submitted its comments on 19 October 2020.

3. The Chair of the Administrative Tribunal issued her decision on the procedure and timetable for the examination of the case.

4. The Applicants submitted a reply on 20 November 2020.

5. The Organisation submitted its comments in rejoinder on 21 December 2020.

6. On 16 January 2021, the chair of the tribunal authorised the production of Mr FF's written report, in his capacity as actuary, in lieu of testimony and gave the Organisation permission to present a testimony or written report in reply to that of Mr FF.

7. On 31 March 2021, the chair of the tribunal granted the Organisation's application for an extension of the time limit, giving it until 30 April 2021 to produce a written reply to Mr FF's expert report and Mr GG's written report.

[1] Recommended by the 263rd report of the Co-ordinating Committee on Remuneration.

8. The Organisation's written reply to the written testimonies of Mr FF and Mr GG was received at the Registry on 30 April 2021.

9. All the documents cited and produced by the Applicants bear the reference letter **A**, whereas those cited and produced in defence by the Organisation bear the reference letter **O**.

HEARING

10. Due to the public health situation, the hearing was held by videoconference on 14 June 2021.

11. The witnesses heard on behalf of the Applicants are Mr FF, Actuary of the Committee of Staff Representatives (CRP) and Mr GG, former Executive Director of the Organisation and pensioner of the Organisation affiliated to the Co-ordinated Pension Scheme (CPS).

12. The witness heard on behalf of the Organisation is Ms HH, Head of the Actuarial Unit of the International Service for Remuneration and Pensions (ISRP).

13. Additional information was provided by Mr II, Head of the Co-ordination Secretariat and Mr JJ, Head of the HR Operations Service.

BACKGROUND TO THE CASE

14. After hearing the witnesses and reviewing the documentary evidence, the Tribunal singles out the facts set out below as relevant.

15. The Organisation has two pension schemes to which officials are affiliated according to the date on which they took up their duties. Officials who took up their duties before 1

January 2002 are affiliated to the CPS. Those who joined the Organisation from 1 January 2002 are affiliated to the NPC.

16. The Applicants are former officials of the Organisation who took up their duties before 1 January 2002, who spent their career with the Organisation and receive a retirement pension from it. All retired before the amendment of Article 36 of the Co-ordinated Pension Scheme Rules (hereinafter 'CPSR').

17. The Applicants, as pensioners of the Organisation, challenge the decision to apply to them the amendment to Article 36 of the CPSR taken by the Council of the Organisation on 14 November 2019[2]. This amendment follows the recommendation of the Co-ordinating Committee on Remuneration (CCR) contained in its 263rd report of 26 September 2019, adopted by all the Governing Bodies of the Co-ordinated Organisations (COs).

18. The Co-ordinated Pension Scheme (CPS) is applicable to officials who took up their duties before 1 January 2002 in the following six organisations: NATO, the European Space Agency, the Council of Europe, the OECD, the European Organisation for the Exploitation of Meteorological Satellites and the European Centre for Medium-Range Weather Forecasts.

19. The CPS's co-ordinating bodies include three committees: the Co-ordinating Committee on Remuneration (CCR) which submits reports, recommendations and advisory opinions, the Committee of Representatives of Secretaries/Directors-General (CRSG) and the Committee of Staff Representatives (CRP), which is consulted on the draft reports.

20. Decision-making powers lie with the governing body of each organisation, in this instance with the Council of the OECD.

[2] C (2019)149 and C/M (2019)15.

21. Article 36 of the CPSR, adopted in 1976, defined the rules for the annual adjustment of pensions paid to retired officials. Article 36 of the CPSR was supplemented in 1978 by a rule of interpretation placed under an asterisk, stating that pension adjustments should conform to salary adjustments. It read as follows:

> 'Should the Council of the Organisation responsible for the payment of benefits decide on an adjustment of salaries in relation to the cost of living, it shall grant at the same time an identical adjustment of the pensions currently being paid, and of pensions whose payment is deferred.
>
> Should salary adjustments be made in relation to the standard of living, the Council shall consider whether an appropriate adjustment of pensions should be made.*
>
> _____
>
> *Whenever the salaries of staff serving in the Co-ordinated Organisations are adjusted - whatever the basis for adjustment - an identical proportional adjustment will, as of the same date, be applied to both current and deferred pensions, by reference to the grades and steps and salary scales taken into consideration in the calculation of these pensions.'

22. Over the years, the changing costs of the pension scheme have been the subject of discussions within the CCR and actuarial analyses have been produced on a regular basis in this context. It should be noted that the officials contribute one-third of the RPC, while the Member countries contribute two-thirds.

23. In 1994, during the co-ordination sessions held in Noordwijk (The Netherlands), the three Co-ordinating committees agreed to increase the officials' contribution rate by 1%,

bringing it to 8%, and to introduce an actuarial measure into the CPS with a view to updating this contribution rate every five (5) years.[3]

24. On 14 November 2019, the Council of the Organisation accepted the recommendations set out in the 263rd report of the CCR and adopted the amendment to Article 36 of the CPSR.[4] Thus, since 1 January 2020, *'Pensions shall be adjusted annually in accordance with the revaluation coefficients based on the consumer price index for the country of the scale used to calculate each pension.'*[5]

25. Consequently, the adjustment of pensions is now based on the consumer price index of countries of residence of the pensioners and no longer on the serving officials' remuneration index.

26. The Applicants argue that the amendment to Article 36:

i) was adopted in violation of the Noordwjik Agreement, the principle that *pacta sunt servanda* and legitimate expectations.

ii) constitutes a violation of vested rights guaranteed by the general principles of international civil service law.

iii) constitutes a violation of legal certainty and the principles of non-retroactivity and unjustified enrichment.

iv) lacks adequate justification and is arbitrary in character.

27. Each of these pleas has been contested by the Organisation, which considers that the amendment to Article 36 of the CPSR falls within the exercise of its discretion. It further argues that it has not violated any promises or agreements, having never given any assurance that Article 36 as adopted in 1978 would remain in place permanently. Finally,

[3] 34th report, CCR/R (94) 2, 29 April 1994, adopted by all the Councils of the co-ordinated organisations.
[4] C (2019) 149 and C/M/s (2019)15.
[5] *Idem.*

it adds that the amendment to Article 36 was adopted for legitimate reasons based on the studies, analyses and recommendations of the experts consulted. That being so, it claims, the implementation of the amendment to Article 36 is not arbitrary in character.

ANALYSIS

1. The violation of the Noordwjik Agreement, the principle that *pacta sunt servanda* and legitimate expectations.

28. The 34th report of the CCR of 29 April 1994[6] establishes that an explicit compromise was made regarding the 1% increase on 1 June 1994 in the officials' contribution rate, involving the dropping of the temporary increase of 0.5% charged since 1993, the repayment to officials of the surplus contributions thus paid and the dropping of appeals against this latest increase; this compromise proposed by the chair of the CCR was explicitly approved by the representatives of the CRSG and the CRP (point 4 of the 34th report).

29. In particular, the position of the CRP is described as follows: *'4.3.1 The CRP agrees with the recommendation of the CCR, appearing in the chair's report (para 5 b), to repeal the interim measure. This measure and the others which accompany it with regard to the application of Article 41 of the Pension Scheme Rules - due to enter into force on 1 June 1994 - have been the subject of in-depth consultation between the three parties. The CRP believes that the report as a whole represents an acceptable compromise among the possible options.'* [7]

[6] Commonly known as the 'Noordwijk Compromise'.
[7] Annex A-5 to the Application.

30. It was also accepted that the CCR would add to the pension scheme rules an actuarial measure to be implemented every five years in order to adjust the officials' contribution rate if necessary.

31. This was as far as the compromise went.

32. The 34th report of 29 April 1994 does not contain any reference to the method of indexing pensions. This is hardly surprising, as the Tribunal notes that in 1994 the wording of Article 36 resulting from the 1978 amendment was still in force: the indexation rule set out there thus remained applicable with the same force to the co-ordinated organisations, without any time limit.

33. The Applicants cite the letter of 9 May 1994 from the chair of the CRP to the chair of the CCR[8], in which he specified that the inviolability of the benefits scheme was a premise on the basis of which the committee had agreed to the 34th report of the CCR; this 'premise' also refers to a doctoral thesis in law, a report to the Parliamentary Assembly of the Council of Europe and an article published in 2000 in an Italian legal journal.

34. This letter, which refers to the tripartite discussions of 20 and 21 April 1994, must be read in context. It makes two points about the interpretation of the CRP's agreement: first, staff concerns about the gaps in the legal guarantee offered by the Member countries of the Organisations with regard to the payment of pensions, and second, the inviolability of benefits.

35. The minutes of the discussions of 20 and 21 April 1994 do indeed clearly show the concerns of staff about the first point (point 2.2.6), and these concerns were reflected in the words of the chair of the CCR and of certain national delegations, which showed

[8] Annex A-8 to the Application.

themselves to be open to the rewriting of Article 40 'Charge on budgets' of Chapter X 'Financing the pension scheme' of the CPS Rules.

36. However, at no point was the issue of benefits raised, let alone discussed. Only two points are indirectly related to these benefits, one of which – a practice specific to the OECD – was generally regarded as lying outside the competence of the co-ordinating bodies (point 5), while the other concerned the leaving allowance of officials in post in Turkey.

37. Furthermore, this observation did not prompt any reaction, let alone confirmation, from the CCG or CRSG. There was therefore no compromise on the point raised by the letter.

38. Then, in the minutes of the tripartite meeting of the CCG, CRSG and CRP of 23 and 24 June 1994 it is simply stated that:

> '10.3.1.1 The Joint Meeting:
>
> -Noted that the CRP found it necessary to point out in a letter to the chair that it had accepted the recommendation contained in the 34th report only because it took it for granted that the benefit system could not be modified during the period of five (5) years preceding the next review of the level of the staff contribution to the pension scheme; and that, as requested by the CCR, the CRP would in due course prepare a document setting out its concerns about the inadequacy of the legal guarantees given by the Member States with regard to the payment of pensions.'
>
> (Tribunal's underlining)

39. This report, unlike the letter of 9 May 1994, is a tripartite document of an official nature. If the words attributed to the CRP's representative were not really uttered or the minutes did not reflect them correctly or, even worse, if this representative differed from the position taken by the chair of the CRP a few weeks earlier, the CRP would have been

perfectly free to ask a correction to be made in good time. This was not done. It is rather late in 2021 to argue that Note 10.3.1.1 does not reflect the contents of a letter written by the chair of the CRP 27 years ago.

40. Finally, even if it is accepted the CRP intended to obtain the CCR's commitment regarding the inviolability of the benefits scheme without any time limit, it is difficult to imagine, concerning the financial equilibrium of a pension scheme that was supposed to last for decades, that the authorities responsible for organising and running the scheme would give an undertaking <u>for ever</u> not to seek to modify any of its elements, given that in 1994 the CPS was a scheme still open to new members, and remained so until 2002.[9]

41. The principle that *pacta sunt servanda* cannot cover such undertakings. As stated by the ILOAT:

> 'To accept that pensions must always be adjusted to keep in line with post-retirement salary increases would be to expose pension funds to an uncertain and unmeasurable future liability which might well in the end wipe out the funds themselves.'[10]

42. In law, neither the CCG nor its successor, the CCR, had the power to amend the Co-ordinated Pension Scheme Rules. Their recommendations are not binding on the decision-making bodies of the co-ordinated organisations. In the present case, it does not follow from any decision after 1994 by the Council of the OECD that the latter undertook never to modify the benefit system. On the contrary, Article 1.1 of the Rules on the Remuneration Adjustment Procedure of the Co-ordinated Organisations states: *'Should any amendments subsequently be made to these rules, no provision which ceases to apply shall give rise to vested rights.'*

[9] See: Commission v. Carreras Sequeros et al., C-119/19 P and C-126/19 paras. 143 & 144.
[10] ILOAT, Judgment 2089, 30 January 2002.

43. The principle of legitimate expectations is reflected in three criteria, all of which apply: (1) the recipients must have received precise, unconditional and consistent assurances from authorised and reliable sources (2) which are likely to give rise to a legitimate expectation (3) and which are consistent with the applicable norms.

44. The Tribunal emphasises that the Organisation alone has the power to establish the pension schemes applicable to its former officials and to set their conditions. It is the only source authorised to give assurances to its officials.

45. The Applicants have not produced any assurances or promises given by the Council of the Organisation that meet the above criteria.[11]

46. The statements of an expert in actuarial calculation and of the OECD's representative in the discussions leading to the 263rd CCR report cannot provide such assurances.

47. Furthermore, none of the information on the pension certificate issued to officials on their retirement concerns the adjustment of pensions.

48. It follows that legitimate expectations cannot have arisen in the absence of precise, consistent and authorised assurances. The fact that pensions were indexed to salaries for several decades does not establish the existence of formal and unconditional assurances.

49. In any case, even if it is accepted that such assurances were given in 1994, they would not have complied with OECD rules in the absence of a Council decision restricting the exercise of its regulatory power to set the rules of the pension scheme and undertaking not to amend the pension indexation method in the future.

[11] *Supra*, note 9.

50. The Applicants also claim that the amendment to Article 36 of the CPSR goes beyond the terms of Article 41 of the CPSR and constitutes a violation of the principle of vested rights.

51. Article 41 reads as follows:

'1. Staff members shall contribute to the Pension Scheme.

2. The staff members' contribution to the Pension Scheme shall be calculated as a percentage of their salaries and shall be deducted monthly.

3. The rate of the staff contribution shall be set so as to represent the cost, in the long term, of one-third of the benefits provided under these Rules.'

52. This article merely regulates the staff contribution to the pension scheme, by establishing the extent of the deduction from their salary. It does not authorise the making of a deduction of the same type from pensions.

53. The indexation of pensions may, in certain circumstances, be less favourable than indexation to the cost of living. However, it cannot be treated as a 'deduction' within the meaning of Article 41 of the CPS. Articles 36 and 41 are therefore independent of each other and the amendment to Article 36 does not contain any contradiction with Article 41.

2. The violation of vested rights.

54. The Staff Regulations recognise vested rights (Art 24 b).

55. The amendment of a provision of the Staff Regulations violates a vested right when it disrupts the balance of contractual obligations or alters fundamental terms of employment in consideration of which the official accepted an appointment. In the present case, the question is whether the indexation of pensions in accordance with salaries was a decisive term of employment.

56. Before establishing the criteria used by case law for the recognition of a vested right, it is necessary to clarify the extent of the rights that the Applicants could have acquired by paying their contributions to the CPS.

57. It is correct that these contributions were calculated in such a way as to cover the costs of a scheme in which, until 2019, pensions were adjusted like salaries.

58. However, this point, of a purely actuarial nature, did not confer on officials the right to receive a pension that was necessarily adjusted to salaries when they retired.

59. The CPS is a scheme with mixed financing: it relies on staff contributions to cover one-third of its costs, and on the Organisation's budget to cover the other two-thirds. While it is open to question whether the CPS can be fully or partially categorised as a pay-as-you-go scheme, it is absolutely certain that it is not a funded scheme.

60. It is therefore incorrect to argue that the payment of contributions calculated to cover the costs of a salary-adjusted pension scheme created the right from a legal viewpoint to receive pensions adjusted on the same basis in perpetuity.

61. While it is accepted that a vested right results, in general, from a contractual stipulation, the same does not necessarily apply to a statutory provision: this therefore applies both to the pension adjustment method, now provided for in Article 36 of the CPSR, and to the salary adjustment rules provided for in Annex I to the OECD Staff Regulations which, following the new wording of Article 36 of the CPSR, are no longer applicable to retired officials. These latter rules are of a statutory nature and not of a customary nature. Consequently, the right to adherence to the terms of employment 'cannot be unreservedly accepted'.[12]

[12] ILOAT, Judgment 61, Lindsey; 832, Ayoub; 4195 of 3 July 2019.

62. Regarding the cause of the amendment, the Tribunal accepts the Organisation's evidence that as a result of the decrease in the number of OECD officials affiliated to the CPS, their number will represent less than 5% of officials within the next ten years. As a result, the amount of officials' contributions to one-third of the cost of the scheme will decrease sharply, whereas the number of officials receiving CPS pensions will increase, according to actuarial projections established by the ISRP, from 1,624 to 1,736. The five-year actuarial studies for the year 2019 show that the long-term cost of the CPS, which was 28.5% of salaries in 2014, rose to 35.4% of salaries before any amendment of the pension scheme.

63. The Applicants state, citing testimonies, that the actuarial studies that led to a sharp increase in the contribution rate of officials affiliated to the CPS as of 1 January 2020 are based on the assessment of the costs inherent to staff's future years of service and not on the assessment of the future costs associated with the pensions of retired officials. This claim cannot be accepted.

64. Since these studies were carried out in compliance with the applicable rules, it is not for the Tribunal to determine whether other actuarial studies could or should have been carried out, nor whether it would have been appropriate to use other assumptions for the actuarial studies conducted in 2019, such as a higher discount rate than that which was chosen or other methods to balance the CPS. As the reasons given to justify amending Article 36 of the CPSR are valid, the Tribunal has no reason to take other, unproven actuarial assumptions into account. It should be pointed out here that the parties are responsible for providing precise and consistent evidence.

65. Moreover, even if the OECD's particular situation, taken in isolation, had not required the amendment of Article 36, the fact remains that the Organisation, exercising its decision-making competence, was justified in following the rules of the co-ordinated CPS scheme to which it belonged. This certainly constitutes a legitimate motivation.

66. As for the consequences of the disputed measure regarding the situation of the persons concerned, it has been shown that the application of the new pension adjustment rule on 1 January 2020, and then on 1 January 2021, led to a smaller revaluation than with the old rule.

67. However, there is no guarantee that in the medium or long term the indexation of pensions to the cost of living will invariably produce a smaller adjustment than indexation to salaries. The tables appended to the 266th report of the CCR show that over a period of 15 years the geometric mean of the annual real salary increase rates did not exceed 0.23%. This discrepancy, if observed in the future, could not lead to an impoverishment of the pensioners that is incompatible with their pension entitlements.[13]

68. This is especially true as the COs are able to establish a budgetary feasibility clause, which in the case of the OECD appears in Article 6 of Annex I of the Staff Regulations.[14] Thus, on five occasions, the adjustment of staff salaries decided on by the Council was – temporarily at least – lower than that recommended by the CCR.

69. In addition, the COs apply a salary moderation clause 'the smoothing effect of which is regarded as effective' according to the opinion expressed by the CRSG at the 135th joint meeting of the three co-ordinating bodies.[15]

70. Finally, the Tribunal notes that according to the minutes of the 174th CRSG-CRP bilateral meeting, held on 21 May 2019, the representative of the Council of Europe on the CRP: '… Emphasised that the staff of her Organisation have suffered a salary freeze for two years; the nominal value of those salaries will drop as a result of the review of the staff contribution rate'.[16]

[13] Annex 0-7 to the Response of the Secretary-General.
[14] Rules on the Remuneration Adjustment Procedure of the Co-ordinated Organisations.
[15] Application, Annex A-14.
[16] Comments in rejoinder, Annex O-2.

71. The new pension adjustment method in fact protects officials against the adverse effects on them of salary stagnation, even of a temporary nature.[17]

72. The calculations relating to the cumulative damage that the application of the new pension indexation method supposedly represents for pensioners only reflect simple assumptions, the validity of which cannot be guaranteed in the long term.

73. In light of the documentary and witness evidence presented, the Tribunal considers that the pension indexation method does not in itself constitute a decisive condition for accepting a job offer, for remaining in the Organisation or for transferring to the CPS pension rights acquired in another scheme, as three of the applicants (Mr BB, Ms CC and Ms DD) did.[18]

74. The Applicants finally claim that the amendment of Article 36 of the CPSR gave rise to a breach of equality between those still working and pensioners, the abandonment of the parallelism between changes in the salary of officials of the co-ordinated organisations and those of the reference public functions, and the non-application to pensioners of the purchasing power parity system.

75. The plea based on the breach of equality is unfounded. As the ILOAT points out: *'However these two classes of individuals are not in the same position in fact or in law (see, for example, Judgment 4029, consideration 20). The former are not members of staff, the latter are. Moreover a salary, at base, is to reward specified work. A pension, at base, is to provide an income stream to a pensioner to maintain a particular standard of living during retirement. This argument is unfounded and is rejected. While these types of payments may be interrelated, they are sufficiently different for the purposes of the application of the "equal treatment" principle.'* [19]

[17] ILOAT, Judgment 2089, 30 January 2002, consideration 16.
[18] ILOAT, Judgment 4195 on a change in the health insurance contribution rate.
[19] ILOAT, Judgment 4057, consideration 7.

76. In addition, the Tribunal sees no reason why only serving officials, whose rate of contribution to the CPS has risen very sharply since 1 January 2020, from 9.5% to 11.8%, i.e. an increase of 24%, should be the only ones to support the efforts necessary to ensure the balance of the CPS.

77. The Applicants allege a breach of equality between pensioners. The Organisation has put forward the uncontested argument that the practice of taking purchasing power parity into account in the pension adjustment method was not in force when Ms DD, Ms CC and Mr AA took up their duties, and they therefore cannot claim any vested rights in this regard.

78. As regards Mr BB and Mr EE, it is true that under Annex I to the Staff Regulations and its Article 5.2, officials' salaries are adjusted according to the product of two indices, one of which reflects the average weighted percentage change in net remuneration in reference public-sector jobs while the other reflects the relevant consumer price index, corrected for purchasing power parity where applicable; these reference jobs are the statistical tool that is used to ensure that officials have equivalent purchasing power, regardless of their country of employment.

79. In this regard, the Tribunal adds to the point just made about the breach of a principle of equality between officials and retirees that serving staff do not have any choice in their place of employment, whereas pensioners are free to settle in the country of their choice and, if they do not wish to remain in the country where they were assigned, still have the possibility of benefiting from the scale of another country that is more favourable if they meet the conditions set out in Article 33 of the CPSR (Annex X to the Staff Regulations). As a result, the differences that could arise between pensioners derive mainly from their choice of country in which to reside after retirement.

3. Legal certainty, non-retroactivity, unjustified enrichment

80. This principle, recognised by the jurisprudence of international tribunals, states that legal rules must be clear and precise in order to ensure that legal situations and relations under the applicable law are foreseeable. The rule according to which pension adjustments have taken place automatically since 2020 with reference to changes in the cost of living meets these requirements perfectly.[20]

81. With regard to non-retroactivity and unjustified enrichment, it should be noted that the amendment of Article 36 only entered into force after its adoption by the Council of the Organisation and in no way affected the pension adjustments that had taken place previously.

82. In order to argue that this amendment nevertheless breached the principle of non-retroactivity, the Applicants state that the contributions deducted from their working salaries were made to meet the cost of a benefit scheme including pension adjustments identical to those of salaries and benefits. They deduce from this that their pensions should undergo the same adjustment.

83. In addition to the fact that this argument repeats in another form the argument based on the violation of a vested right, which has already been rejected by the Tribunal, it should be noted that there is no legal relationship in the CPS between the contributions paid while working and the retirement pension, as is the case in a funded scheme.[21]

84. Under the CPS, contributions paid by serving officials at least partly finance the pensions of retired staff. Therefore, in the years preceding 2020, the officials' contributions were

[20] ILOAT, Judgment 4057, 6 February 2019, consideration 5.
[21] EUCST, 2 March 20 no. 16, Frieberger and Vallin.

in fact used to finance pensions benefiting from the salary adjustment system, which is sufficient to rule out the plea based on the unjustified enrichment of the OECD.

85. Finally, the Applicants note the marked disproportion between, on the one hand, the benefit arising for the Organisation from a reversal of provisions of 102 million euros reflecting, at the end of 2019, the reduction in commitments resulting mainly from the new pension adjustment rule, and on the other hand, the corresponding loss of 45,000 euros for each of the OECD's 2,263 CPS pensioners or members.

86. With regard to this plea, the Tribunal considers that a comparison between two valuations, one collective and the other individual, which makes no distinction between working and retired officials and, moreover, contains no details as to the length of the future period taken into account, is irrelevant and therefore without legal significance.

4. Inadequate justification and arbitrariness of the measure.

87. In addition to the remarks about the alleged breach of vested rights, the Tribunal notes that over the past decade several draft amendments to the CPS have been discussed within the co-ordinating bodies. In 2017, it was decided to examine all questions relating to this scheme starting in the following year.[22]

88. In this context, in March 2019, five of the six COs proposed two amendments concerning the future indexation of pensions to the cost of living and the restriction of the conditions for granting the education allowance. In October 2019, after several joint meetings of the three co-ordinating bodies and four bilateral meetings between the CRSG and the CRP, the CCR adopted a recommendation to this effect with immediate entry into force.

89. At the same time, discussions took place within the co-ordinating bodies in the same year about what conclusions should be drawn from the actuarial study covering the upcoming

[22] Comments in rejoinder, Annex O-12, 263rd report of the CCR.

five-year period; these discussions led to the 266th report of the CCR and the recommendation made to the COs to increase to 12.1% the staff contribution rate to the NRP, which had been permanently reduced to 11.8% by the use of the new pension adjustment method.

90. The Tribunal therefore rules that the contested measures were adequately justified and were discussed within a timeframe that allowed the CRP to assert its opposition to any reform of the CPS – as in fact it did. However, it would have been a good idea to communicate them directly to the Applicants so that they did not have to refer to the CCR's 263rd report and to the discussions that preceded its adoption.

91. As to the arbitrariness of the new pension adjustment rule, it is not for the Tribunal to decide that other measures could or should have been examined or applied.

FOR THESE REASONS, THE TRIBUNAL

1. DECIDES that the Applicants' application is admissible.

2. DISMISSES the Applicants' application on its merits.

3. DISMISSES the application for a cost award.