

**B. (No. 15), H.
and P. (L.) (No. 30)**

v.

EPO

134th Session

Judgment No. 4551

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Mr F. B. (his fifteenth), Mr R. H., as successor-in-title of the late Ms O. S., and Mr L. P. (his thirtieth) on 14 March 2020 against the European Patent Organisation (EPO) and corrected on 5 May, the EPO's single reply of 30 September, the complainants' rejoinder of 13 November 2020 and the EPO's surrejoinder of 16 February 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which none of the parties has applied;

Considering that the facts of the case may be summed up as follows:

The complainants contest modifications made with respect to the use of mass emails within the Office.

Mr B., Mr P. and Ms S. were at the material time permanent employees of the European Patent Office, the EPO's secretariat. They were also elected members of the Staff Committee as well as members of the EPO Staff Union (SUEPO). Mr B. and Mr P. file their complaint in their individual capacity and as an "elected staff representative/union official". As Ms S. passed away, her sole heir, Mr H. files the complaint in her name. Mr P. indicates that since he is no longer in service his rights in his capacity as a staff representative may be taken over by a newly elected

staff representative as “successor in title” of that role. Mr H. makes a similar statement concerning Ms S. In that case their rights and cause of action should be “subrogated or assigned to” Mr B.

On 13 May 2013, the President of the Office issued Communiqué No. 26 entitled “When enough is enough – the use of mass emails within the Office”. He noted that staff representatives were using mass emails increasingly, and that, in many instances, these emails were polemical and factually incorrect. He therefore announced that he would shortly be setting up rules on mass communications.

The Vice-President of Directorate-General 4 issued a Communiqué on 31 May 2013 stating that communication was essential to the sound functioning of the Organisation and that access to communication tools, deriving from freedom of association and speech, had to be guaranteed. However, when using these tools, each staff member should respect the EPO’s rules and principles, and emails were not a medium for transmitting internal mass communication messages. Consequently, as from 3 June, the sending of emails to more than fifty addressees would be subject to the criteria laid down in Communiqué No. 10 of 29 March 2006. Hence, only authorised employees wishing to exchange information in support of the EPO’s mission, goals and objectives, job-related information retrieval and information to maintain or gain knowledge related to professional duties would be allowed to send mass emails. He stressed that there was a facility for communication by the staff representation and the trade unions via dedicated intranet pages under their sole responsibility adding that, if required by those concerned, the Office would provide assistance to maintain and improve their intranet pages.

The complainants filed identical requests for review in the summer of 2013 challenging Communiqué No. 26 and the Communiqué of 31 May 2013. They alleged that the ban on the use of emails affected them in their daily work as members of both the Local and the Central Staff Committees. The measures introduced by the contested texts violated Article 34(1) of the Service Regulations for permanent employees of the Office since the Staff Committee could not “maintain suitable contacts with the staff” nor provide “a channel for the expression of

opinion by the staff'. In addition, the email traffic going to the aforementioned Committees was blocked.

On 5 September 2013 the President rejected the requests for review on the ground that the contested Communiqués were well founded. At the end of November 2013, the complainants lodged an internal appeal with the Appeals Committee requesting that the decision to block the e-mail traffic going to and from the Staff Committees or Union Bureaus be quashed, and that the possibilities for internal communications in place before 31 May 2013 be restored. They also claimed moral damages for having had to endure an attack on their rights of free association and free communication, and for the unreasonable delay in dealing with their appeals as well as costs.

After having heard the parties, the Appeals Committee issued a single report on 11 October 2019. It unanimously considered that the appeals were receivable insofar as the complainants had lodged their appeal in their individual capacity contending the contested restrictions had an adverse effect on their rights to freedom of expression and to freedom of association. It also held that the complainants, who were all members of the Staff Committee, had standing to lodge an appeal in that capacity. They could validly claim that they were, in their role as staff representatives, directly and adversely affected in the exercise of the rights conferred on them under Article 34(1) of the Service Regulations as communication with staff was an inherent part of their tasks and mandate, and that the measures in dispute directly restricted their means of communication. However, the majority concluded that the appeals were unfounded. First, it found that the Communiqué of 31 May 2013 was not taken *ultra vires* as the Office was entitled, on the basis of Communiqué No. 10 of 2006 and of the President's decision to restrict the use of mass emails, to restrict the number of addressees to whom emails could be sent without prior authorisation. Second, the contested restriction came within the terms of Article 38(3), first indent, of the Service Regulations which meant that no prior consultation of the General Advisory Committee (GAC) was required. Third, the majority did not find any established evidence of an illegitimate motive in the contested measure. It accepted that the contested restriction, as was stated in the

Communiqués of May 2013, aimed at stopping the increase in the volume, frequency and aggressive content of mass emails that was “spiralling out of control”. Hence, the contested restriction could not be considered inappropriate or disproportionate. In addition, the fact that mass emails sent out by the “Amicale”, a leisure club, were not subject to the same restriction did not amount to inequality of treatment since the Amicale’s situation was not comparable to that of staff representatives. Consequently, the majority recommended rejecting the appeals as unfounded insofar as they were receivable. It nevertheless stated that the contested restriction was “objectively and undeniably strict and, in normal circumstances, not easily justifiable”.

To the contrary, the minority considered that the de facto suppression for all staff representatives of the possibility to communicate via mass emails with staff was unlawful. The contested restriction should therefore be quashed, and the complainants should be awarded moral damages in view of the severity of the breach of law, which deprived them of their fundamental rights to freedom of association and freedom of communication. They should also be reimbursed their costs. The Appeals Committee unanimously recommended awarding them 600 euros each by way of moral damages for the length of the internal appeal proceedings.

On 16 December 2019, the President informed the complainants that he had decided to reject their appeals as partly irreceivable and entirely unfounded. He maintained that members of SUEPO (the Staff Union of the European Patent Office, which is not a statutory organ of the EPO) did not have *locus standi* to appeal. On the merits, he endorsed the recommendation of the Appeals Committee’s majority and its reasons. He agreed to pay the complainants 600 euros each for the length of the procedure. He added that, in November 2018, he had adopted a one-year pilot allowing some invitations to be sent by Staff Committees for their respective assemblies, and that discussions were ongoing to further extend the scope of permitted mass emails. That is the decision they impugn before the Tribunal.

Each complainant asks the Tribunal to quash the impugned decision, to order the EPO to set aside Communiqué No. 26 of 13 May 2013 and the “Communication” of 31 May 2013, and to order the EPO to restore all facilities for internal communication, including, but not limited to, access to unrestricted mass emails for the Staff Committees and the Union, as was the case before 31 May 2013. They also ask the Tribunal to order the EPO to take, without further delay, all necessary measures to prevent any attempt to breach the complainants’ individual right to freedom of association, as well as that of all staff, and to take all necessary measures to prevent and protect the complainants’ right to freedom of association as members of the Local and Central Staff Committees and members of a trade union, and of all other staff members acting in the same capacity. In addition, they ask the Tribunal to order the EPO to refrain from taking any measure of censorship breaching their rights and, more broadly, the rights of all staff. Each complainant further seeks an award of 20,000 euros in moral damages for the serious breach of their rights since 2013, as well as 5,000 euros for the excessive length of the internal appeal procedure. Lastly, they claim reimbursement of the costs and expenses incurred during the proceedings, including but not limited to, legal costs as per attorney invoices.

The EPO asks the Tribunal to reject the complaints as partly irreceivable, and devoid of merit. It stresses that members of SUEPO do not have *locus standi*, and that an individual staff member, even if he or she is a member of a staff union, has no general mandate to litigate on behalf of others. In addition, Ms S. and Mr P. are no longer members of the Staff Committee, and therefore lack standing in that capacity. Mr B. ceased to be a member of the Staff Committee in July 2020. The EPO further asks the Tribunal to reject some specific claims as irreceivable for lack of competence. It adds that it has already paid the complainants 600 euros each in compensation for the delay in the internal appeal proceedings and considers that amount to be adequate.

CONSIDERATIONS

1. As the three complaints are based on the same material facts and raise the same issues of fact and law, and, in addition, the complainants' arguments are embodied in one brief, they may be dealt with in a single judgment and are therefore joined.

2. Firstly, the Tribunal shall address the threshold issues raised by the EPO.

The EPO alleges that the complaints are partly irreceivable since:

- (a) the complainants are no longer staff representatives as they are not members of the Staff Committee; and
- (b) the complainant Mr B. filed his complaint also in his capacity as a member of SUEPO; members of SUEPO do not have *locus standi* to appeal under Articles 106 and 108, paragraph 1, of the Service Regulations; nor do they have *locus standi* before the Tribunal, since the Tribunal's justice system is of an individual nature under Article II, paragraph 5, of its Statute.

3. These two arguments are unfounded.

Mr B., Mr P. and Ms S. – whose son files the complaint before the Tribunal as her sole heir – lodged their appeals with the Appeals Committee in their capacity both as staff members and as staff representatives. When the present complaints were filed with the Tribunal in March 2020, two out of the three, namely Mr P. and Ms S., were no longer staff representatives. During the present proceedings, Mr B. also ceased to be a staff representative (as from July 2020).

The complainants allege an infringement of their rights to freedom of association, communication, and speech, which are granted to individual employees. The Tribunal's case law holds that each staff member of an international organisation has a right to freely associate and the organisation has a corresponding duty to respect that right. This is a necessary element of their employment (see Judgment 4194, consideration 7; Judgment 911, consideration 3). Each is entitled to commence proceedings intended to defend that right or challenge an

alleged breach of it (see Judgment 4155, consideration 2). As a result, it is enough for the Tribunal that the complainants brought their complaints in their capacity as staff members (Mr H., acting as successor-in-title of the deceased staff member Ms S.).

4. The issues of receivability raised by the EPO with regard to the *locus standi* of the complainants in their capacity as staff representatives and/or as members of SUEPO, are in theory relevant insofar as they are related to the pleas that the complainants submit in that capacity. Nonetheless, for reasons that will appear clear later (see consideration 13), the Tribunal will not address these pleas, but only those ones alleged by the complainants in their capacity as staff members. Consequently, there is no need to address the issues of receivability related to pleas which will not be dealt with.

5. There is a further threshold issue that the Tribunal shall address *ex officio*.

The complainants challenge two general decisions, the first announcing future rules on mass emails, and the second setting out new rules on mass emails. The Tribunal's case law holds that a member of staff cannot impugn in proceedings in the Tribunal a general decision unless and until an individual decision which affects the member of staff personally is made based on the general decision. But the Tribunal's case law contains an exception or limitation. As the Tribunal said in Judgment 3761 at consideration 14: "In general, [an administrative decision of general application] is not subject to challenge until an individual decision adversely affecting the individual involved has been taken. However, there are exceptions where the general decision does not require an implementing decision and immediately and adversely affects individual rights." This is equally true regarding the right to associate freely (see, for example, Judgments 496, consideration 6, and 3414, consideration 4). As the Tribunal observed in that latter case, all officials of international organisations have a right to associate and an implied contractual term in the appointment of each that the relevant organisation will not infringe that right. Accordingly, the Tribunal held that the complainant could invoke the Tribunal's jurisdiction to seek to

argue that his rights had been directly and adversely affected by general decisions. In the present case, the complainants allege that the Communiqué of 31 May 2013 immediately and directly affected the right of staff members to freely associate, by stating that as from 3 June 2013 emails sent to more than fifty addressees would be allowed only if authorised, and, if not, they would be automatically blocked and not dispatched. As to Communiqué No. 26 of 13 May 2013, it was the first step of the process that was finalized with the issuance of the Communiqué of 31 May 2013; therefore, it was properly contested together with the Communiqué of 31 May 2013 in the internal appeal and in the present complaints.

6. The complainants' main plea is focused on the violation of their fundamental right to freedom of association (Article 30 of the Service Regulations), and it can be summed up as follows:

- (i) no staff member can individually send a mass email to other staff members to share work-related information without having received a prior authorisation, which has a “chilling effect” on their ability to communicate;
- (ii) the EPO has thus established a “censorship measure” under which communication among staff is only permitted under supervision; and
- (iii) according to the Tribunal, the “freedom of association is destroyed” where communication is only permitted under supervision.

7. The Organisation replies that:

- (i) the requirement of prior authorisation before the sending of mass emails to more than fifty recipients complies with the Tribunal's case law (the Organisation relies on Judgment 3156);
- (ii) the possibility to send mass emails remains, upon an authorisation to do so;
- (iii) staff representatives can distribute printed documents or use the intranet pages of the Staff Committee or of SUEPO;

- (iv) the situation is different to that in Judgments 496 and 2227 as, in the present case, only mass communications sent to more than fifty recipients require an authorisation;
- (v) the contested Communiqués were justified as they aimed at stopping and preventing staff representatives from abusing the mass communication tool offered to them; and
- (vi) the general rules governing the use of the electronic communication system are embodied in Communiqué No. 10, which has remained unchanged, and which applies to all staff.

8. It is appropriate to recall that before the issuance, on 13 May 2013, of Communiqué No. 26, and of the subsequent Communiqué of 31 May 2013, the use of the office e-mail by the staff members and the staff representatives was governed by Communiqué No. 10 of 29 March 2006 entitled “Guidelines on the use of electronic communication systems” (hereinafter Communiqué No. 10) and by the President’s Announcement of 28 December 2011.

Articles 2 and 3 of Communiqué No. 10 defined the authorised and non-authorised uses of e-mail communications, as follows:

“Article 2

Authorised use

1. Access to the Internet and to e-mail systems is provided as an Office resource for authorised users and for the execution of official business.
2. The purposes for which use of the Internet and e-mail are generally authorised are: the exchange of information in support of the EPO’s mission, goals and objectives, job-related information retrieval and the communication of information to maintain or gain knowledge related to professional duties.
3. Provided usage remains restricted in terms of time and system capacity, and on condition that official tasks are not impacted, the EPO has no objections in principle to occasional personal use such as e-banking and viewing electronic news media. This must not place significant load on the IS services.

Article 3
Non-authorised use

1. The Office's Internet access and e-mail services must not be used for illegal purposes, or for any purpose contrary to the interests of the European Patent Organisation (Article 14 ServRegs), or for operating a private business.
2. The services must not be used in a way contrary to the provisions of the Guidelines for the protection of personal data in the EPO or in any way that may be regarded as insulting or offensive towards any other person, company or organisation.
3. They must not be used in any way that might disrupt the functioning of the service; or interfere with the integrity of the Office's computers, networks and data; or jeopardise the security of the Office's IT systems.
4. Similarly, acts that interfere with the secure and reliable functioning of other parties' computers, networks and data are not permitted.
5. Annex 1 to these guidelines provides examples of activities that are not permitted."

Annex 1 to Communiqué No. 10, in turn, contains a non-exhaustive list of activities that are not permitted under the guidelines. "[...] Harassing or denigrating individuals or groups [...]; Accessing, collecting, storing, sharing or transmitting [...] defamatory [...] material", inter alia, is not allowed.

By the Announcement of 28 December 2011 the President decided to provide staff representatives access to mass e-mails, in order "[...] to ensure Staff Committee members have equal means of communicating information to staff [...]". In the same Announcement, the President reminded staff of "[...] the duty to exercise due caution in the number and frequency of e-mails sent".

By Communiqué No. 26 of 13 May 2013, the President deplored the excessive number of mass communications sent to staff members by staff representatives using the office e-mail addresses. The Communiqué read as follows, in the relevant part:

"No fewer than 79 texts of various descriptions, of which 56 from SUEPO, 15 from the [Central Staff Committee] and 8 from Local Staff Committees, have been actively pushed to staff from beginning of 2013; in 4 months alone that means one text every 1.6 days."

The main concern of the Communiqué did not seem to be the egregious quantity of mass communications, but rather their content. The Communiqué went on as follows:

“This would, perhaps, be of minor importance were it not for the content of an increasing number of these texts. In many cases they are polemical and factually incorrect, which is regrettable. But with an increasing tendency, texts are published which contain vindictive personal attacks, which is unacceptable.”

The Communiqué held that “[m]isuse of mass communication by staff representatives has a long history at the EPO”.

On these grounds, the Communiqué announced that shortly afterwards new rules on mass communications would be set out, aimed at providing “means to staff representatives as well as helping to ensure minimum standards of respect and decency”.

Soon afterwards, the Communiqué of 31 May 2013 followed, which governed the “[u]se of mass emails”, and the content of which, in the most relevant part, is reproduced below:

“Email is not a medium for transmitting internal mass communication messages. As laid down in our rules, its use is linked to administrative and business-related matters.

[...]

The purpose of the present communiqué is to recall the basic framework for the use of electronic communication systems, in particular for the sending of mass emails.

As from 3 June, the sending of emails to more than 50 addressees, in one or several batches, will be subject to the criteria laid down in Communiqué n° 10 of 29 March 2006 [...]

As a result, as from 3 June 2013, emails sent to more than 50 addressees, in one or several batches, will be allowed only for authorised employees in respect of the above mentioned rules.

Moreover in the event an e-mail dispatch to more than 50 addressees in one batch is attempted, the sender will receive the following automated message:

‘Your message has not yet been distributed because the number of addressees is larger than 50. The dispatch of business related email to more than 50 addressees needs to be requested via email to communication@epo.org’.

[...] there is a facility for communication by the staff representation and the trade unions via their dedicated Intranet pages under their sole responsibility. If required by those concerned, the Office is ready to provide assistance to maintain and improve their Intranet pages.

Bearing in mind the necessity for any institution to respect rules, I count on the professionalism and cooperation of each of you in ensuring that communication tools are used properly.”

9. As noted in consideration 3 above, the Tribunal’s case law has long recognised that staff of international organisations have a general right to associate freely. There can be no doubt that freedom of association is a well-recognised and acknowledged universal right which all workers should enjoy. It is recognised as a right by the Tribunal as well as by a large number of international conventions and declarations (see, for example, the 1998 ILO Declaration on Fundamental Principles and Rights at Work, Article 2(a); the 1966 International Covenant on Civil and Political Rights, Article 22; the 1966 International Covenant on Economic, Social and Cultural Rights, Article 8), and by the Administrative Council of the EPO itself, which recognised the importance of human rights when formulating the rights and obligations of staff (see Judgment 4482, considerations 12 and 13). Article 30 of the Service Regulations, entitled “Freedom of association”, provides: “Permanent employees shall enjoy freedom of association; they may in particular be members of trade unions or staff associations of European civil servants”. The role of staff associations or unions is to represent the interests of members primarily in dealing with their employing organisation on issues concerning the staff. Staff associations or unions should be able to do so unhindered or uninfluenced by the Administration of the employing organisation. Were it otherwise, the role would be compromised (see Judgment 4482, consideration 8).

Freedom of association necessarily involves freedom of discussion and debate. In Judgment 274, under 22, the Tribunal stated that “this freedom when feelings run strong [...] can spill over into extravagant and even regrettable language”. Nonetheless, the Tribunal also acknowledged that freedom of discussion and debate is not absolute and that there may be cases in which an Administration can intervene if, for example, there is “gross abuse of the right to freedom of expression or lack of protection

of the individual interests of persons affected by remarks that are ill-intentioned, defamatory or which concern their private lives” (see Judgments 2227, consideration 7, and 3106, consideration 8).

The Tribunal’s case law has it that a staff association enjoys broad freedom of speech and the right to take to task the Administration of the organisation whose employees it represents, but that like any other freedom such freedom has its bounds. Thus, any action that impairs the dignity of the international civil service, and likewise gross abuse of freedom of speech, are inadmissible. But the prevention of such abuse cannot give the Administration a power of prior censorship over the communication of written information produced by the groups and associations concerned (see Judgment 911 and Judgment 2227, consideration 7).

In Judgment 3156 the Tribunal held that, in specific cases, a prior authorisation for the dispatching of mass emails could be justified: “The freedom of speech and the freedom of communication [...] are not, however, unlimited. Not only is an organisation entitled to object to misuse of the means of distribution made available to its staff committee [...], but it also follows from the case law [...] that the right to freedom of speech does not encompass action that impairs the dignity of the international civil service, or gross abuse of this right and, in particular, damage to the individual interests of certain persons through allusions that are malicious, defamatory or which concern their private lives. [...] Since organisations must prevent such abuse of the right of free speech, the Tribunal’s case law does not absolutely prohibit the putting in place of a mechanism for the prior authorisation of messages circulated by bodies representing the staff. An organisation acts unlawfully only if the conditions for implementing this mechanism in practice lead to a breach of that right, for example by an unjustified refusal to circulate a particular message” (see Judgment 3156, considerations 15 and 16).

10. As observed earlier, the right to freely associate is a general right that enshrines more specific rights, which are necessary or useful in order to ensure that the right to freely associate is effective. It includes the rights to freedom of communication, information, and speech in all forms,

including discussion and debate (see Judgment 3106, considerations 7 and 8). Such rights are vested not only in their authors (usually the staff representatives), but also in the recipients. The right of each staff member to freely associate also includes their right to freely receive communications and information, and their right to listen to speeches. In this perspective, every limitation to the right of staff representatives to send mass emails to the staff members, is also a limitation to the right of the staff members to receive mass emails.

Free communication, information, and speech also imply:

- (i) the right to the confidentiality of communication, information, and speech; and
- (ii) the right to freely choose the means by which the communications are sent, information is provided, and speeches are given.

An organisation is entitled to issue reasonable guidelines in order to govern the use of the office emails by staff members and staff representatives, and to establish authorised and non-authorised uses. Insofar as the criteria on the use of mass emails are underpinned by general interests, such as those listed in Communiqué No. 10 of 29 March 2006, they shall be considered lawful, as they ensure a reasonable balance between the interests of the organisation and the fundamental rights to free communication, information, and speech, vested in the staff members and their staff unions and representatives. This general balance should not allow a prior supervision or preventive censorship by the organisation on the content of the communications, information, and speech (see Judgment 2227, consideration 7). However, the Tribunal's case law considers lawful a mechanism of prior authorisation under exceptional circumstances (see Judgment 3156, considerations 15 and 16 quoted in full in consideration 9 above).

Staff members and their representatives are not allowed an indiscriminate and unfettered exercise of their rights to freedom of communication, information, and speech. Their "freedom" must be consistent with the duties of the staff members towards the Organisation and towards fellow staff members. Freedom of communication, information, and speech is not freedom to insult or to offend (see Judgment 3106, considerations 7 and 8). The communication, information, and speech

fall within the responsibility of their authors. Those that exceed the boundaries of freedom and fail to respect the duties of a staff member or result in insults or offences should be subject to disciplinary proceedings and sanctions.

Whether a communication, information, or speech violates the duty of the staff members can be established only on a case-by-case basis, and, normally, after the communication, information, and speech are divulged.

11. In the light of the findings expressed in consideration 10 above, the Tribunal holds that the EPO had granted a reasonable balance in the use of mass emails by means of Communiqué No. 10 and of the Announcement of 28 December 2011.

The subsequent Communiqué No. 26 of 13 May 2013 and the Communiqué of 31 May 2013 are lawful in the part where they recall the content of Communiqué No. 10 and remind the staff members that mass emails are not allowed where they contain insults or offences. It falls within the power and capacity of an organisation to address to its staff members a general reminder that communications and information violating the standards expected of international civil servants should be avoided. As a result, Communiqué No. 26 is lawful in its entirety, as it is a mere declaration of intent, and announces future measures, but does not divert from the content of Communiqué No. 10.

On the contrary, the Communiqué of 31 May 2013 is unlawful to the extent that it restrains the use of mass emails, requiring a prior authorisation by the Organisation for the sending of mass emails to more than fifty addressees. It is unlawful because it sets out an indiscriminate limitation, without providing specific reasons for this measure, irrespective of technical difficulties for the emails' dispatching, and, moreover, for an indefinite time. The Organisation has not submitted that this prior authorisation was required for technical reasons, and has provided no evidence that mass emails to more than fifty addressees could jeopardise the operation of the IT System at the EPO. In fact, the wording of the two impugned Communiqués revealed that the true reason for the requirement of the prior authorisation was to exercise a prior censorship

on the content of the communications. Indeed, the one of 13 May 2013, deplored the “misuse” of mass communications by staff representatives, underlining the circumstance that “[i]n many cases they [were] polemical and factually incorrect”. The one of 31 May 2013 required an authorisation for the dispatching of mass emails, but failed to give any further reason, since it did not explain whether an authorisation was required for technical needs or for other reasons.

Even though the Tribunal’s case law has considered lawful, under exceptional circumstances, a prior authorisation for mass communications (see Judgment 3156, consideration 16), the Tribunal holds that in the present case these exceptional circumstances did not exist. The factual circumstances of the case decided by Judgment 3156 were completely different. In that case, an organisation twice suspended the right of a staff representative body to send mass emails to all staff, but it did so by temporary measures, which lasted less than one month the first time, and around fifteen days the second time. Moreover, these measures were adopted after, and grounded on, a violation, by the staff representative body, of the confidentiality of an administrative investigation (see Judgment 3156, considerations 3, 6, 18, 20 and 21). What is most relevant, in the case decided by Judgment 3156, is that the interim measures were lifted shortly afterwards, and the right to send mass emails was reinstated; in addition, there was no evidence that, in the brief period during which the measures remained in force, they were applied and resulted in individual refusals to dispatch mass emails. On the contrary, in the present case, the prior authorisation was imposed as a general preventive measure, independent of specific violations and without any time limit. Moreover, the Organisation failed to provide evidence that the communications were “action that impairs the dignity of the international civil service, or gross abuse [...], damage to the individual interests of certain persons, through allusions that are malicious, defamatory or which concern their private lives” (see Judgment 3156, consideration 15). The Organisation provided no evidence that one or more of these circumstances occurred here. Freedom of association, communication, information, and speech vested in staff members and staff representatives encompasses the right to criticise the employer. The Tribunal is satisfied that the mass emails provided by the parties in the present case did not exceed the limits to

freedom of opinion and speech, and therefore did not justify the mechanism of a prior authorisation. The Organisation did not have the power to prevent or to impede communications among staff representatives and staff members only on the basis that they appeared, according to the Organisation, to be “polemical” or “factually incorrect”, or to substantiate “vindictive personal attacks”. The EPO failed to provide evidence that the communications went beyond the bounds of legitimate, though harsh, criticism, and trespassed into the realm of gross violations of the rights of the Organisation or individuals. In the present case, the measures taken by the Organisation were disproportionate.

12. Since the freedom of communication, information, and speech includes the right to choose the proper means, the Organisation is not allowed to impose certain means (such as, in the present case, the dedicated intranet webpage) rather than others (the mass emails). This is particularly true where the means offered (or imposed) are more complicated and less viable than the other ones technically available, or are even under the supervision of the Organisation itself. In the present case, the alternative means offered by the Organisation consisted in an intranet webpage on the Organisation’s website. This is, manifestly, a less viable means of communication and, moreover, it is under the supervision and the management of the Organisation, and not under the complete control by and availability for the staff representatives. It must also be recalled that according to the Tribunal’s case law, the ability of a body representing the staff to circulate emails to all staff members is not “a privilege”. Such body “has a legitimate right to avail itself of this facility, unless there is good cause for restricting it” (see Judgment 3156, consideration 14).

13. With their further pleas, the complainants allege:

- (i) failure to consult with the GAC in violation of Article 38, paragraph 3, of the Service Regulations;
- (ii) failure to consult with staff representatives.

Since the impugned decision of 16 December 2019 must be set aside for the considerations above, there is no need to rule on these other pleas advanced by the complainants to challenge its lawfulness as well as the related issues of receivability raised by the Organisation.

14. In conclusion, the impugned decision of 16 December 2019 shall be set aside. The Communiqué of 31 May 2013 shall be set aside in the following parts:

“Email is not a medium for transmitting internal mass communication messages. As laid down in our rules, its use is linked to administrative and business-related matters. [...]

As a result, as from 3 June 2013, emails sent to more than 50 addressees, in one or several batches, will be allowed only for authorised employees in respect of the above mentioned rules.

Moreover in the event an e-mail dispatch to more than 50 addressees in one batch is attempted, the sender will receive the following automated message:

‘Your message has not yet been distributed because the number of addressees is larger than 50. The dispatch of business related email to more than 50 addressees needs to be requested via email to communication@epo.org’.
[...]

15. The Tribunal notes that the setting aside of the impugned decision and of the above-specified parts of the Communiqué of 31 May 2013 reinstates the former rules on mass emails contained in Communiqué No. 10 and in the Announcement of 28 December 2011.

The complainants also request the Tribunal to order the EPO:

- (i) to restore all facilities for internal communication;
- (ii) to take all necessary measures to prevent any future attempt to breach the complainants’ individual right to freedom of association, as well as that of all staff;
- (iii) to take all necessary measures to prevent and protect the complainants’ right to freedom of association as members of the Local and Central Staff Committees and members of a trade union, and of all other staff members acting in the same capacity (this last claim is receivable only for Mr B.);
- (iv) to refrain from taking any measure of censorship breaching their rights and, more broadly, the rights of all staff.

Insofar as the complainants essentially ask the Tribunal to order the EPO to modify its rules concerning the use of mass communications, their claims are irreceivable. The Tribunal has no jurisdiction to make such orders (see Judgment 2793, consideration 21).

Inasmuch as the complainants ask the Tribunal to order the EPO to respect the present decision, the Tribunal is not empowered to require undertakings as to performance of obligations in the future (see Judgment 2636, consideration 16).

16. Each complainant further seeks an award of 20,000 euros in moral damages for the “serious breach” of their rights since 2013. The Tribunal finds that the annulment of the impugned decision is in itself a sufficient remedy for any moral injury the complainants may have conceivably suffered.

17. Each complainant seeks an award of 5,000 euros for the excessive length of the internal appeal procedure. The complainants have already been paid 600 euros each in respect of this delay and the Tribunal finds this amount to be sufficient compensation for the delay in the internal appeal proceedings.

18. The complainants are entitled to costs of the present proceedings, set at 900 euros in total as they filed identical complaints.

DECISION

For the above reasons,

1. The impugned decision of 16 December 2019 is set aside.
2. The Communiqué of 31 May 2013 is set aside in the part indicated in consideration 14 above.
3. The EPO shall pay the complainants collectively 900 euros as costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2022, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, Mr Jacques Jaumotte, Judge, Mr Clément Gascon, Judge, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

HUGH A. RAWLINS

JACQUES JAUMOTTE

CLÉMENT GASCON

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ