Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

**B. (No. 15), D. (No. 4)
and F. (No. 24)**

v.

EPO

(Applications for execution)

138th Session **Judgment No. 4887**

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications for execution of Judgment 4551 filed by Mr F. B., Mr D. D. and Mr T. F. on 2 March 2023, the reply of the European Patent Organisation (EPO) of 17 April 2023, the applicants' rejoinder of 24 May 2023, the EPO's surrejoinder of 23 September 2023, the applicants' additional submissions dated 13 October 2023 and the EPO's final submissions dated 20 November 2023;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal, and Article 6, paragraph 5, of its Rules;

Having examined the written submissions;

CONSIDERATIONS

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

The Tribunal notes that Mr B. files the application for execution in his individual capacity and Mr D. files this application as successor-in-title of Mr B. insofar as the latter had filed the complaint leading to Judgment 4551 in his capacity as staff representative. Mr D. is Chair of the Local Staff Committee in The Hague, Netherlands. Mr F. files the application for execution in his capacity as successor-in-title of Mr L. P., who was a complainant in Judgment 4551 and who had filed the original complaint in his individual capacity and in his capacity as staff representative. Mr F. is an elected representative of the Central Staff Committee and a member of the EPO Staff Union (SUEPO).

2. In Judgment 4551, the Tribunal found that the Communiqué of 31 May 2013 was flawed insofar as it limited the use of mass emails and subjected it to a prior authorisation as "a general preventive measure" (consideration 11). The Tribunal also stated that the EPO was not allowed to limit the freedom of communication, information, opinion, and speech and, more broadly, to interfere with the right of the staff representation to send emails, and the right of staff to receive them (considerations 10 to 12), and that the EPO was not allowed to exercise any prior review over the content of these emails. Based on these considerations, the Tribunal decided: (i) to set aside the impugned decision dated 16 December 2019; (ii) to set aside parts of the Communiqué of 31 May 2013; and (iii) to order the EPO to pay the complainants collectively 900 euros as costs. The Tribunal dismissed all other claims submitted by the complainants.

3. In these applications, the complainants ask that the Tribunal "order the immediate execution of Judgment No. 4551 within the meaning of the said judgment", and, namely, that the Tribunal:

(i) set aside parts of the Communiqué of 31 May 2013 as detailed in consideration 14 of Judgment 4551;

(ii) remove without condition or further restriction the 50-addressee rule for all communications, regardless of the sender within the meaning of Communiqué No. 10 of 29 March 2006; and

(iii) grant the staff and its representation (staff committees and unions) access to the mailing lists set up by the EPO in order to be able to freely send mass emails without prior authorisation or request.

The complainants contend that:

(a) the EPO is limiting the implementation of Judgment 4551 by relying on a new argument that has never been raised before the Tribunal, namely the need to maintain a balance between the right to privacy and the right to freedom of speech, communication and information;

(b) an unreasonable amount of time has already elapsed for the execution of Judgment 4551;

(c) the EPO has failed to implement Judgment 4551 with due diligence and good faith;

(d) the new "unsubscribe option" required by the EPO for communications issued by the staff representation undermines the latter's role and results in a disparity of treatment with the Administration, which is not required to have the unsubscribe option;

(e) the use of an external provider would undermine the privacy of personal data; and

(f) the requirement of a data protection statement from the staff representation is another attempt by the EPO to improperly limit the freedom of staff and their representation.

4. The EPO raises a number of receivability issues concerning the absence of a cause of action for one of the complainants and the previous exhaustion of internal means of redress with regard to the challenge of the new rules on data protection. On the merits, the EPO alleges that it has taken all the necessary steps to implement Judgment 4551 and that the new rules on data protection must be taken into account. The EPO states that it has established a global framework, which enables Staff Committees and unions to send mass emails directly to staff members, without prior authorisation and/or supervision over their content, in accordance with the freedom of communication,

information, and speech. In addition, the EPO alleges that it is ready to allow the use of mass emails through a third-party provider, already chosen. The only remaining step to be completed by the Staff Committees is to adequately inform the data subjects – i.e. all staff – of the processing of personal data through the data protection documentation. The EPO notes that all other organisational units have had to do the same and that the Office's Data Protection Register contains over 200 records of processing operations. Thus, according to the EPO, in order to grant the effective use of mass emails one final step is necessary, and it is up to the staff representation to provide the required data protection documentation. The EPO maintains that all entities, including Staff Committees, must adhere to the data protection framework in force in the Office. It adds that the application for execution of Judgment 4551 is a "roundabout way" for the complainants to unduly discuss aspects of the new data protection framework in force in the Office since 1 January 2022, with which they disagree, and with which they refuse to comply.

5. It is well settled in the Tribunal's case law that the Tribunal's judgments carry the authority of *res judicata* and must be executed as ruled, and the parties must work together in good faith to this end. Judgments must be executed within a reasonable period of time. In order to ascertain whether this is the case, all the circumstances of the case must be taken into account, especially the nature and the scope of the action which the organisation is required to take (see Judgments 4708, consideration 6, and 3066, consideration 6). Having regard to the Tribunal's case law according to which all the circumstances of the case must be taken into account, the Tribunal holds that where a judgment concerns staff members' rights due to be exercised also in the future, in order to implement such a judgment, an organisation is allowed to take into account the new rules which entered into force after the relevant facts, irrespective of whether the new rules had entered into force before or after the delivery in public of the judgment.

6. It is useful to recall that in Judgment 4551, the Tribunal stated:

> "[T]he 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 [...]" (Consideration 11.)

The Tribunal also stated:

> "[T]he 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:
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> "'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'". [...]'" (Consideration 14.)

The Tribunal also clarified that:

> "[T]he 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." (Consideration 15.)

Judgment 4551, therefore, reinstated the rules contained in Communiqué No. 10, and, relevantly, its Article 3, stating:

> "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 [of the Service Regulations]), 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.
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> 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 [Information Technology (IT)] systems.
>
> 4. Similarly, acts that interfere with the secure and reliable functioning of other parties' computers, networks and data are not permitted.
>
> [...]"

7. Firstly, the Tribunal notes that Judgment 4551, in consideration 14, directly set aside some parts of the 31 May 2013 Communiqué. In this respect, Judgment 4551 is self-executing and does not need further implementation by the Organisation. The complainants are seeking a legal effect already stemming from Judgment 4551, and, thus, their applications for execution are unfounded in this respect.

8. Secondly, the Tribunal notes that, based on consideration 15 of Judgment 4551, which reinstated the former rules on mass emails contained in Communiqué No. 10, the EPO, in implementing Judgment 4551, is bound to apply Article 3, paragraph 2, of this Communiqué. To this extent, the EPO is allowed to require that "[t]he [e-mail] services must not be used in a way contrary to the provisions of the Guidelines for the protection of personal data", also taking into consideration the new Data Protection Rules in force since 1 January 2022 (see decision CA/D 5/21 adopted on 30 June 2021). In so doing, the EPO, contrary to the complainants' contention, is not relying on a new argument that had never been raised before the Tribunal, namely the need to maintain a balance between the right to privacy and the right

to freedom of speech, communication and information. This balance was already required since the issuance of Communiqué No. 10. Indeed, according to the rules already applicable at the relevant time, mass emails sent by staff representatives should comply with the Guidelines for the protection of personal data. Considering that data protection rules have changed over time and might further change in the future, mass emails are subject to the data protection rules in force when the mass emails are dispatched (see Article 55 of the Data Protection Rules in force since 1 January 2022). In this respect, the EPO's requirement, based on the reasoned opinion of the Data Protection Officer issued on 15 September 2022, that the staff representation's communications contain the "unsubscribe option" and the "data protection statement" is not in breach or circumvention of the *res judicata* principle. When the Tribunal allows a complaint and at the same time leaves an organisation "a degree of discretion" for its further action, the new decision will ordinarily be subject to appeal, and, in that case, the internal remedies do have to be exhausted. But the application for execution must relate only to the Tribunal's judgment; it is not an opportunity for challenging the content of a new decision (see Judgments 4708, consideration 6, and 1771, consideration 2(b)). To the extent the EPO has required measures aimed at protecting staff privacy, namely the "unsubscribe option" and the "data protection statement", this is a new decision that should first be contested before the internal appeal body. Thus, as correctly objected by the EPO, the questions raised by the complainants concerning whether the data protection requirements for mass emails are legitimate or proportionate, are irreceivable for failure to exhaust internal means of redress.

9. Thirdly, based on Article 3, paragraph 3, of Communiqué No. 10, the EPO, in implementing Judgment 4551, is allowed to require that the email services are not 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". To this extent, the requirement for an external provider cannot be considered to be in breach or circumvention of the *res judicata* principle, and, for the reasons already stated in consideration 8 above,

such requirement is a new decision, subject to internal appeal, and not directly challengeable before the Tribunal.

10. In conclusion, the EPO, by requiring that staff representatives, in the dispatching of mass emails, respect the rules in force for the protection of personal data and avail themselves of an external IT provider, did not circumvent or breach Judgment 4551. As a result, the applications for execution are dismissed.

11. Since the applications fail on the merits, there is no need to address the receivability issues raised by the Organisation.

DECISION

For the above reasons,

The applications for execution are dismissed.

In witness of this judgment, adopted on 23 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER