



Case Number: D 0003/04

D E C I S I O N
of the Disciplinary Board of Appeal
of 5 July 2005

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
25 September 2003.

Composition of the Board:

Chairman: B. Schachenmann
Members: B. Günzel
P. Gendraud

Summary of Facts and Submissions

- I. By letter dated 30 September 2003 the appellant was informed of the decision of the Examination Board of 25 September 2003, that the appellant was not successful in the European qualifying examination ("EQE") held in March 2003.
- II. The appellant's performance had been marked as follows:
- A: 56
 - B: 50 (upgraded)
 - C: 40
 - D: 55
- III. The appellant appealed the decision of the Examination Board in respect of the "fail" grade awarded to Paper C, by letter received on 13 October 2003. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 10 November 2003.
- IV. As a main request the appellant requested that a "pass" grade be awarded for paper C. As an auxiliary request the appellant requested that a compensatory "fail" grade be awarded for paper C.
- V. The appellant's submissions can be summarised as follows:

The appellant sat the European qualifying examination in London. However, the conditions in the examination centre were unsuitable to hold such examinations. Candidates had to share examination tables, there were no windows in the examination centre and the artificial

lighting was extremely poor. This meant that candidates had very little desk space for text books and examination papers and scripts and insufficient light to properly review the large number of documents to be considered. These conditions remained unaltered for the duration of each examination and had led the appellant to have a severe headache during the later stages of each examination. The unsuitable conditions in the UK examination centre which were not present in other examination centres meant that the examinations were not held "simultaneously" across all centres, as required by Article 23 REE.

In accordance with the complaints' procedure set out in OJ EPO 1995, pages 153 onwards, the appellant had filed a complaint, noting these conditions, at the end of the last examination. He had received a letter from the EPO dated 15 July 2003 saying that the complaint would be taken into account during the marking procedure. However, it was not apparent from the breakdown of marks in the schedule of marks that his complaint had indeed been taken into account during the marking procedure. In fact, the mark awarded in Paper C was a simple aggregate of the marks awarded by marker 1 and marker 8.

The appellant further submitted that, had his complaint been taken into account properly, his grade would have been upgraded to a "pass", or at the very least, a "compensatory fail" leading to a "pass" grade for the EQE as a whole. From his results in the other examination papers it was apparent that, despite the conditions, he achieved 50% or more in each of these examinations. Moreover, for the four papers A, B, C, D,

as they stood, he had in excess of 200 points which would have qualified him to be considered for a "pass" in the EQE as a whole had he obtained an extra 5% in paper C. The appellant submitted that this small shortfall was directly attributable to the unequal conditions complained of. It was also to be noted that the shortfall of marks occurred in the "argumentation" section of paper C which was examined towards the end of the 6 hour examination.

Reasons for the Decision

1. According to the examination file the appellant submitted a written complaint concerning the conduct of the examination, in accordance with point 7 of the Instructions to candidates concerning the conduct of the examination (in the version applicable in 2003 published in "Ancillary Regulations to the European Patent Convention 2003", Article 134(8), 3.3, p. 199). The appellant complained that the venue for that years' EQE was, in many peoples eyes, not suitable. Not only were candidates expected to share desks, but also the lighting was very poor. This left many of the candidates, the appellant included, with a headache during much of the afternoon sessions.

2. By letter dated 15 July 2003 the appellant was informed by the Head of the Examination Secretariat that the Examination Board, at it's meeting of 29 April 2003 had decided that: "Your complaint will be taken into consideration during the marking procedure".

However, the Examination Board's letter dated 30 September 2003, informing the appellant of the decision that the appellant had not been successful in the European qualifying examination 2003, only contains the results of the marks awarded by the Examination Board to the papers sat by the appellant. There is no mention of the appellant's complaint, neither that it was actually taken into consideration nor what the result of any such consideration was. Similarly, the marking sheets of the examination committees, including that for Paper C, enclosed with the said letter only show the number of marks allocated by the two markers respectively, for the different sub-items in which the assessment of the merits of the candidate's answer to the respective paper is broken down. Again no indication whatsoever can be derived from the schedules of marks that the appellant's complaint was considered in the marking procedure.

3. The practice that decisions which are adverse to candidates are not reasoned has been accepted in the jurisprudence of the Disciplinary Board of Appeal for those decisions of the Examination Board informing candidates that they have failed the examination, to the extent that the result of the marking procedure is concerned. This has been accepted in view of the fact that a certain amount of discretion is an essential element in the marking process which is subject to only limited review by the courts, i.e. review is confined to clear abuses of discretion in the marking procedure (D 12/97 OJ EPO 1999, 566, point 3 of the Reasons). However, even such decisions have at least to show that the marking of the candidates answers was indeed carried out in accordance with the applicable

provisions, and what the result of this marking was. In the same way, if a candidate has filed a complaint, the decision declaring that candidate's fail in the examination has at least to show that the candidate's complaint was indeed considered and what the result - positive or negative - of this consideration was. In the present case this applies all the more since with letter dated 15 July 2003 the appellant was informed that the Examination Board had, at its meeting of 29 April 2003, decided that the appellant's complaint would be taken into consideration during the marking procedure. The appellant therefore rightly objects to the fact that there is no trace, whatsoever, in the Examination Board's letter informing him of his "fail" that his complaint was indeed considered and what the result of the evaluation of the merits of the appellant's complaint was.

In the Board's view, moreover, where the Examination Board finds the circumstances referred to in a complaint not to justify the allocation of additional marks, a short reasoning why this is so, should be given.

In the present case the Board is aware from another appeal case (settled in the meantime) that the present appellant is not the only candidate having complained about the poor desk space available for candidates and the poor lighting conditions in the 2003 London examination centre.

4. It is, at least at this point in time, not for the Board to evaluate the merits of the appellant's complaint, but it will be for the Examination Board to

decide - again - on the appellant's "pass" or "fail" of the EQE considering the appellant's complaint. Therefore the decision under appeal has to be set aside and the case remitted to the Examination Board for a new decision.

5. The appeal is essentially based on the fact that the appealed decision did not show that the appellant's complaint was taken into consideration. Thus, it cannot be ruled out that the appellant would not have appealed had the decision under appeal shown this. Reimbursement of the appeal fee paid appears therefore equitable, Article 27(4) REE.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examination Board for a new decision to be taken.
3. The appeal fee is to be reimbursed.

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann