



**Europäisches
Patentamt**

Beschwerdekammer
in Disziplinarangelegenheiten

**European
Patent Office**

Disciplinary
Board of Appeal

**Office européen
des brevets**

Chambre de recours statuant
en matière disciplinaire

Case Number: D 0037/07

D E C I S I O N
of the Disciplinary Board of Appeal
of 13 February 2008

Appellant: N.N.

Decision under appeal: Decision of the Examination Secretariat dated
24 October 2007.

Composition of the Board:

Chairman: J.-P. Seitz
Members: B. Günzel
N. M. Lenz

Summary of Facts and Submissions

- I. The appeal lies from the decision of the Examination Secretariat for the European qualifying examination of 24 October 2007 refusing the appellant's application for enrolment for the European qualifying examination 2008.
- II. The decision is based on the ground that the application was received on 25 September 2007 and thus after the closing date for enrolment for the European qualifying examination 2008 which was 21 September 2007.
- III. On 9 November 2007 the appellant appealed the decision. The appeal fee was paid on 18 November 2007. The statement setting out the grounds of appeal was filed on 23 November 2007.
- IV. On 18 December 2007 the Examination Secretariat decided not to rectify its decision and forwarded the appeal to the Disciplinary Board of Appeal.
- V. By a communication dated 28 December 2007 the Board informed the appellant that in order to be able to reach a decision in time before the EQE 2008 the holding of oral proceedings was considered expedient. In view of the short time span remaining before the date set for the EQE 2008 this was, however, only possible with the appellant's agreement to a notice of summons being issued less than 2 months before the oral proceedings.
- VI. The appellant gave her consent and oral proceedings were scheduled for 13 February 2008. The Examination

Secretariat was asked for information on its practice of exercising discretion, if any, in cases of late receipt of applications for enrolment. The President of the EPO and the President of epi were given the opportunity to file observations.

VII. In a communication dated 15 January 2007 accompanying the summons to oral proceedings the Board informed the appellant of its doubts whether there was a legal basis for regarding the Examination Secretariat as having discretion or as being obliged to accept late filed applications for enrolment applying the principles of due care or of proportionality. Furthermore, the Board drew the appellant's attention to some aspects of the appellant's submissions which would appear to have to be discussed in the context of an issue of all due care having been observed. In particular, one such issue would be whether or not it met the standard of all due care that the appellant had contented herself to generally indicate to the secretary by when the application ought to reach the EPO, or was she expected to give precise instructions as to how the application was to be mailed to the EPO?

VIII. The President of the EPO did not file observations. The President of epi observed that in order to practice as a representative before the EPO, it was necessary to know how to ensure that deadlines were met in urgent cases, by choosing an appropriate delivery service. In the present case it appeared that the appellant did not take all due care which should be expected from someone who intended to qualify as a professional representative. Therefore the preliminary view of the Board should be followed.

IX. By letter dated 4 February 2008 the Head of the Examination Secretariat explained its practice that non-compliance with the deadlines for enrolment results in the refusal of applications received after these deadlines. Allowing candidates to enrol even shortly after the closing date would oblige the Examination Secretariat to allow this for all candidates. This would result in a shift of the deadline and, as an ultimate consequence, might make the organisation of the examination impossible. Nevertheless, the Examination Secretariat examines if the circumstances of the non-compliance with the deadlines may constitute or be comparable to a case of "force majeure". "Force majeure" is defined by the Examination Secretariat as being an exceptional event or effect that can be neither foreseen nor controlled and that could not reasonably be avoided. Moreover, the "force majeure" must have prevented the candidate to act and enrol within the deadlines.

This was not so in the present case. The appellant's application for enrolment could have been sent by a postal service with a delivery aim of 2-3 working days or even by fax which was allowed according to point 4. of the Announcement for the EQE 2008. The circumstances of the present case did thus not constitute a case of "force majeure".

X. The submissions of the appellant, as filed in writing and as made in the oral proceedings before the Board can be summarised as follows:

(a) According to point 3 of the Announcement of the European qualifying examination 2008 (OJ EPO 3/2007, 150) the extended closing date for resitters was Friday, 21 September 2007. On Tuesday, 18 September 2007 the appellant handed the completed application form to the departmental secretary with the instruction that it needed to be at the EPO in Munich by Friday. She believed that the application would be processed by the office staff in the usual way. This meant for documents which were sent not well in advance of the expiry of a time limit that they would be faxed and sent by post using, in cases like the present one where there remained only three days before expiry of the time limit, Royal Mail's Airtsure Service. This was a priority international postal delivery service with a delivery aim of 2-3 working days. The departmental secretary handed the application to the site receptionist, asking her to send it to Munich using a delivery service that would ensure it arrived by Friday, 21 September 2007. The site receptionist did, however, not send the application using Royal Mail's Airtsure service, but used Royal Mail's International Signed For service which was a registered postal service with a delivery aim of 3-5 working days.

(b) Paragraph 5 of point 4 of the Announcement of the European qualifying examination 2008 recommended that candidates submit their applications by registered letter with advice of delivery. Royal Mail's International Signed For service satisfied this recommendation. Upon enquiry Royal Mail had informed the appellant that the letter containing her application had entered their delivery system on Tuesday 18, September and arrived at London Heathrow

airport on Wednesday, 19 September. It then left on the next available plane to Frankfurt airport, which was on the morning of Thursday, 20 September. Upon arrival at Frankfurt airport Deutsche Post unexpectedly and very surprisingly did not process the letter until Monday, 24 September.

- (c) The appellant enclosed, as an Annex to the Statement setting out the grounds of appeal, three pages of internet print-outs concerning descriptions of different delivery options offered by Royal Mail as well as affidavits by herself, by the departmental secretary, the site receptionist and by a European Patent Attorney being the supervisor of the appellant's work and largely responsible for her training.
- (d) The appellant acknowledges that the provisions of the EPC are not directly applicable to the proceedings of the EQE. The criterion applicable to the present case was therefore not that of Rule 84a EPC 1973 but the standard of due care as established in the case law prior to the inception of Rule 84a EPC 1973 on 1 January 1999. Whether or not all due care has been taken was to be decided on a case by case basis. The appellant referred to decision T 667/92 and the criteria defined therein which, according to the appellant, reflect the principles established in the case law prior to 1 January 1999. In the said decision the Board of Appeal had decided that a) the appellant had had good reason for not submitting the documents to the EPO further in advance of the deadline due to the unusual circumstances leading up to the deadline, b) the appellant had used an appropriate delivery service,

and c) the appellant could not have foreseen the delay that occurred in the delivery.

These requirements were met in the present case: The six and a half week period between receipt of the results of the 2007 examination and the deadline for enrolment had been very busy due to multiple work commitments (which are set out in detail) and 6 days of a pre-booked holiday. The appellant believed that her instructions would ensure delivery in time which would have been the case had an appropriate delivery service been used.

- (e) The appellant also referred to the principle of proportionality and in this context to decision T 111/92 having granted re-establishment for an appeal in which the time limit had been missed by only two days, because the Board was convinced that the deadline had been missed due to a genuine mistake and the appellant had always intended to submit the documents to the EPO in time. In the circumstances of the appellant's case the sanction of being refused the opportunity to sit the EQE 2008 would be excessive and disproportionate. Her career may be adversely affected because she would not be able to resit Papers B and C before March 2009. Furthermore, the disproportionate nature of the sanction would be highlighted by comparing the significance to the appellant as an individual of the rights she may have lost with the administrative burden that could be placed upon the EPO in accepting a single additional candidate for the European qualifying examination 2008.

- (f) Moreover, the fact that the Examination Secretariat had booked the fee paid for enrolment and, within a period of one month after receipt of her application for enrolment, had not informed her that her application was not going to be accepted, had made her legitimately believe that she would be enrolled for the EQE 2008 despite the delay and she had started preparation for the EQE 2008 on this basis.

XI. The appellant requests:

- (a) Reversal of the refusal of enrolment
- (b) Accelerated processing before the Disciplinary Board of Appeal
- (c) Reimbursement of the appeal fee.

XII. Oral proceedings before the Board were held on 13 February 2008. In these the appellant repeated the requests filed in writing and further expanded on the views taken in her written submissions.

Reasons for the decision

1. It is not disputed by the appellant and is established jurisprudence of the Disciplinary Board of Appeal that the provisions governing the EQE, in particular the Regulation on the European qualifying examination for professional representatives (REE) and the Implementing provisions (IP), are *lex specialis* for the EPC, and that the EPC applies in connection with them only where they expressly refer to it (see D 7/05, OJ EPO 2007, 378, point 17. of the reasons, and the further decisions cited in that decision). The provisions of

the EPC governing re-establishment are not referred to in the provisions governing the EQE. As a consequence, it is indicated in point 4. of the Announcement of the EQE 2008 published in the OJ EPO 3/2007, 150, and even highlighted in bold that applications received after the closing date **will** be refused. It is furthermore indicated that Articles 121 and 122 EPC are not applicable.

2. The appellant has not further explained why, nevertheless, the standard of due care ought to be applicable to cases of late filed applications for enrolment i.e. on what legal basis or for which legal grounds this criterion could be applied. To this, the appellant has submitted that since Rule 84a EPC 1973 (establishing in conjunction with the decision of the President dated 11 December 1998 (OJ EPO 1999,45) a minimum of 5 days before the expiry of the time limit for posting) was not applicable to applications for enrolment because the EPC was not applicable to them, a standard of due care must apply instead. However, the appellant has not explained why that ought to be the case and the Board does not find any logic in this conclusion.

2.1 Article 20 REE provides for the publication of a notice of the examination specifying inter alia the dates by which applications for enrolment must be filed. This appears to express the legislator's intent to afford a stringent nature to the deadline for enrolment. Hence, missing of the closing date for enrolment appears to be conceivable as being excused only under very exceptional circumstances, if any. Even though not being allowed to sit one year's EQE may have an adverse

effect on a candidate's career perspective, it is not evident that the consequence thereof ought to be that the standard for allowing late filed applications for enrolment should be the one applied in restitution situations. It could also be argued that, in the overall interest of safeguarding a proper preparation of the EQE, possible exceptions, if any, have to be more narrowly defined.

- 2.2 Setting a closing date for enrolment which is binding for the candidates is both justified and necessary in view of the legitimate purpose and overwhelming importance of ensuring timely and orderly preparation of the European qualifying examination (EQE) in the interest of all the many yearly candidates.

In the year 2007 1809 candidates sat the Examination, 1071 of them being resitters. According to the Examination Secretariat 2.228 candidates have been enrolled for the EQE 2008. As these figures show, the number of candidates sitting each year's examination is enormous and is ever increasing. Clearly, to the extent that late filed applications are accepted from individual candidates that has to be done for all candidates. Thus, when it comes to defining under which conditions, if any, the Examination Secretariat ought to accept late filed applications the issue is not, as the appellant has submitted, that an individual candidate would be added to the list of sitters, a fact which would indeed not hamper the proper preparation of the EQE, but the issue may well be that broader admission of late filed applications could severely harm the well functioning of the EQE.

2.3 A look into the comprehensive jurisprudence of the boards of appeal on the requirements of due care in restitutio cases shows how manifold the reasons for missing a deadline can potentially be and how complex the question of due care normally is. It requires thorough and time consuming examination of all the individual facts of the case by the deciding body. The time schedule for the preparation of the EQE is tight and does not allow for lengthy admission procedures in a considerable number of cases.

In the oral proceedings the appellant has submitted that late filed applications should be accepted at least in situations in which the applications were sent to the EPO before the deadline. However, where the relevant criterion would be the question of due care the Board would find it unjust and would see no basis for allowing such applications to proceed while refusing the same to other candidates having also missed the deadline without a fault of their own but for other reasons.

2.4 Therefore, if some kind of general principles were to be applied on the modalities under which late filed applications for enrolment ought to be accepted, in the view of the Board there are good reasons to think that these ought not to be more liberal than the standard applied at present by the Examination Secretariat, which is to accept late filed enrolments in cases of "force majeure" only.

3. However, that need not be decided in the present case. Even assuming for the sake of argument that observance

of all due care was the relevant criterion the appeal could not be allowed.

3.1 In the view of the Board the appellant can not be said to have observed all due care by simply handing the enrolment form to the departmental secretary with the sole instruction that it needed to be at the EPO in Munich by Friday instead of giving precise instructions as to how the form was to be communicated to the EPO. Moreover, the appellant has admitted in the oral proceedings that she did not ascertain herself before the expiry of the deadline on Friday, 21 September that and how her application had been dispatched and whether it had reached the EPO. Had she done this and then noticed there was no proof for its receipt by the EPO the application could still have been faxed on Friday, thereby ensuring its arrival in time at the EPO.

3.2 Contrary to the appellant's contention it is not recommended by the Examination Secretariat that applications should be filed by post. On the contrary, point 4. of the Announcement of the European qualifying examination 2006 mentions in the first place the possibility to file the application by fax. Thereafter candidates are advised (highlighted in bold) to submit their application as early as possible. The passage then goes on to say that when applications are sent by post, it is strongly recommended to proceed by registered letter with advice of delivery. That is an entirely different message from what the appellant contends it to be.

3.3 According to the appellant the application for enrolment was seen in her office as being a candidate's

personal matter and therefore the deadline for enrolment was not entered in the office's diary system. As a consequence, the office's cross-checking system could not help in detecting that anything had not been executed as the appellant submits it ought to have been done. In the view of the Board that is all the more a reason why it would have been incumbent on the appellant herself to verify personally before expiry of the deadline whether her application had reached the EPO. As a consequence, the jurisprudence, referred to by the appellant, on the issue that an applicant or a representative is entitled under certain conditions to delegate functions is not relevant for the present case.

- 3.4 As regards the appellant's reference to decision T 667/92 of 10 March 1994 the following is pointed out:

By contrast with the facts underlying the said decision, according to Appendix A to the grounds of appeal delivery within 2-3 working days of mail despatched by Airsure is not a guaranteed delivery time but is only qualified as a delivery aim. There is, thus, no promise by the carrier that mail dispatched by Airsure will, when processed under normal circumstances, reach the addressee within the period indicated. The term "delivery aim" is vague and does not even clearly indicate that this form of postage would normally ensure all post to reach their addressees within the time span indicated. Therefore, it would appear to the Board that longer delivery times needed in an individual case cannot be qualified as an extraordinary event which a careful applicant would not have to take into account when deciding when to dispatch a document if the importance of meeting a

closing date is evident (see 5. and 6. above, see also T 777/98, OJ EPO 2001, 509, point 2.4 of the reasons).

Thus, in the view of the Board even if the appellant's application had been dispatched by Airsure service observance of all due care would have required the appellant to ascertain that her application had indeed been received by the EPO on Friday.

On the basis of the data in point 2.4 of the appellant's statement setting out the grounds of appeal (for which there is no evidence other than the affidavit submitted by the appellant) the application letter, after having travelled to Frankfurt Airport by plane on Thursday, 20 September (am), was not processed by Deutsche Post until Monday, 24 September. It is noted, however, that the letter was nevertheless received at the EPO within the five working days indicated as (upper limit of the) delivery aim for the service which was actually chosen by the secretary. Thus, that delivery service does not appear to have been the appropriate one, as acknowledged by the appellant, and there was no extraordinary delay in the delivery within the meaning of decision T 667/92.

- 3.5 Having missed a time limit as a result of a mistake made under excessive workload in the period under consideration has occasionally been accepted in the jurisprudence of the boards of appeal as justifying re-establishment. However, for enrolment for the EQE a resitter has to do no more than fill in another application form the evidence of his or her entitlement to take part in the examination having already been provided previously. Hence, what remains to be done by

a resitter wishing to enrol again does not appear to involve time consuming acts which could not be performed even when being under time constraints.

3.6 The appellant has furthermore relied on the application of a principle of proportionality in view of the severe consequences for the appellant of not being admitted to the EQE 2008 and the fact that the closing date was missed only by two working days. The appellant has referred in particular to decision T 111/92 of 3 August 1992.

3.7 Whether or not the disproportionality of the sanction, in particular in relation to the extent of the delay, can be taken into account when determining the observance of all due care in the context of restitution cases appears not to have been answered in a uniform manner in the jurisprudence of the boards of appeal, see e.g. decision T 971/99 of 19 April 2000, point 3. of the reasons, where the position is taken that whether or not all due care has been observed depends only on the character of the conduct before the time limit expired and not on the length of the ensuing delay. The present Board tends to the latter view. If the contrary view were adopted where can then a line be drawn between the length of delay that has to be considered and one which is simply too long to be considered? Moreover, it appears to the Board that the legal system of mandatory time limits entailing, when missed, a loss of rights, would be undermined.

3.8 However, that question also does not need to be decided in the present case. Where this principle is to be applied, all the circumstances of the case have to be

considered. Thus, in decision T 111/92 many other factors were relevant for the Board's conclusion that all due care was observed, such factors being e.g. the presence of a proper reminder system in the office and the Board's conviction that the miscalculation having lead to missing the time limit was an isolated mistake in an otherwise satisfactory system (point 4. of the reasons). It appears to the Board that in that decision the lack of proportionality of the sanction in relation to the fact that the grounds of appeal were filed only two days late was at best an additional consideration confirming a conclusion which the Board had reached primarily on the basis of other considerations contained in the reasons for the decision.

- 3.9 In the present case the appellant has drawn on the importance of the enrolment for a particular examination considering that the examination is held only once a year and that therefore a candidate not being able to sit the examination in one year has to wait a further year before he or she may potentially be able to practice (subject to the further condition that he or she passes the examination). It is thus, in a candidate's own vital interest to observe the deadline for enrolment. It appears to the Board not to be an excessive burden put on a candidate if he or she is expected to make sure personally that all that is necessary is done for receipt in time of the application by the EPO. In the present case this applies all the more as only measures as simple as filling in a form, ascertaining as to whether it was received and potentially sending the application again by Fax on Friday were required from the appellant. Therefore, the Board is unable to see that by applying

the principle of proportionality the late filing should be accepted.

4. In the oral proceedings the appellant raised the additional argument that the fact of not having received a refusal of her enrolment from the Examination Secretariat within almost four weeks after receipt of her application in conjunction with the fact that the fee for her enrolment was actually booked by the Examination Secretariat had created a legitimate expectation on her behalf that she would be enrolled for the EQE 2008. According to Article 10(5) REE an application for enrolment shall not be deemed to have been filed until the prescribed fee has been paid. Therefore, the EPO is under an obligation to accept the payment of the fee which is a pre-requisite for the validity of the application and the examination of its allowability.

First, the Board has doubts whether any legitimate expectation of being enrolled could be based on the fact of not having had a reply. Second, with an overall number of more than two thousand applications it is clear that there is time needed for the cash & accounts department to deal with the payments and for the Examination Secretariat to deal with the applications and issue the decision letters where necessary even if these appear to be standard letters to a large extent. A period of four weeks before a decision of refusal is issued by the Examination Secretariat does not appear excessive to the Board. For this reason as well, no legitimate expectation of being enrolled for the examination could be based on that fact.

5. As a result, the Board concludes that the Examination Secretariat has rightly refused the appellant's application for enrolment for the EQE 2008.
6. The appeal being dismissed there is no legal basis for refunding the appeal fee (Article 27(4) REE).

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

J. P. Seitz