



**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 0044/07

D E C I S I O N
of the Disciplinary Board of Appeal
of 17 December 2008

Appellant: n.n

Decision under appeal: Decision of the Examination Board for the
European qualifying examination dated 13 August
2007 that the appellant failed the examination

Composition of the Board:

Chairman: J.-P. Seitz
Members: R. Menapace
C. Onn

Relevant facts and submissions

- I. On 12 November 2007 the Appellant filed an appeal against the decision of the Examination Board dated 13 August 2007 and notified to him on 29 August 2007, that he had not been successful in the European qualifying examination ("EQE") 2007. The appeal fee was paid on the same day.

- II. The notice of appeal contained also the grounds, a request for re-establishment of rights and a payment order for the prescribed fee for the case that the appeal was found to have been filed outside the time limit pursuant to Article 27 of the Regulation on the European qualifying examination for professional representatives ("REE"). As to the request it was submitted that in the critical period the Appellant was on vacation for preparing his marriage on 18 August 2007 and for honeymoon afterwards, and furthermore, that he was unable to evaluate the decision under appeal before he knew of the Examiner's Report on 5 November 2007, which was not distributed to him, nor was he in any way informed when it would be accessible to him.

- III. In its communication dated 17 July 2008 the Board *inter alia* pointed out, that the Appellant's unawareness of the Examiner's Report is not a fact which prevented him from observing the time limits for filing the notice of appeal and the statement setting out the grounds. "Unable" implies an objective fact or obstacle preventing the required action. Re-establishment of rights as an extraordinary means of judicial remedy offers no choice to a party as a substitute for the

proper action to be taken, nor does it imply any right to have the fatal effect of an intentional step - here the appellant's decision not to appeal against the decision of the Examination Board within the prescribed time limit - cancelled, even if this step later on proved to have been a mistake.

IV. In his reply received on 13 August 2008 the Appellant argued that in analogy with Article 108 EPC and the decision T 41/82 an appeal not filed in time is deemed not to have been filed; As his appeal had been given the number 44/07 to which the Board in its communication, the EPI, the EPO and its president had referred to, the appeal is existing and consequently it has to be deemed to have been filed. It follows that also the request for re-establishment of rights must be deemed to have been granted by the board, since the failure to observe the time limit was deemed not to have ensued. That was true for both time limits, since the notice of appeal and the statement of its grounds were filed simultaneously.

Furthermore, he submitted that it would be rather "Kafkaesque" to appeal against a decision without knowing the grounds of it, here the grounds for the result of paper C. Only on the basis of the Examiner's Report it was possible for the Appellant to evaluate the grounds for which marks were or were not given, and to identify possible flaws of the examination procedure.

Reasons for the Decision

1. The fact that the appellant filed the notice of appeal and the statement of the grounds and paid the appeal fee after expiration of the applicable time limits (on 29 September/October) is not altered by the treatment of the appeal by the Office including a communication of the responsible Board of Appeal, or by formal comments of the President of the Office or third parties. No decision establishing the contrary has been (and could be) taken. Decisions T 473/91 and 949/93 do not in any way support the Appellant's arguments to the contrary.

2. It follows that the question whether or not the appeal is admissible depends on the outcome of the request for re-establishment of rights, the latter being admissible but not allowable:
 - 2.1 In particular in view of the content of the communication dated 17 July 2007 the Board is unable to accept the Appellant's contention that the treatment of the appeal by the EPO entailed an implicit grant of the request for re-establishment of rights.

 - 2.2 Article 24(2) of the Regulation on the discipline for professional representatives ("RDR"), which pursuant to Article 27(4) REE shall apply to the procedure before the Disciplinary Board of Appeal, contains two fundamental conditions: First, that the party to the proceedings concerned - in the present case the candidate (Appellant) - was unable to observe a time limit and, secondly, in spite of all due care required by the circumstances having been taken.

- 2.3 As to the first condition Article 24(2) RDR explicitly states that the party in question must have been unable to observe the time limit. The word "unable" (in the French version "n'a pas été en mesure", and German version "verhindert worden ist") implies an objective fact or obstacle preventing the required action. Such an obstacle could e.g. consist of a wrong date inadvertently being entered into a monitoring system, or an outside agency influencing the observance of the time limit (for example a delay in delivery service). Only when such a fact made the party unable to observe the time limit would the circumstances of the case be examined as to the second condition "in spite of all due care" (cf. decision T 413/91 on Article 122 EPC which is identically worded in this respect)
- 2.4 *Restitutio in integrum* is an extraordinary means of judicial remedy. It offers no choice to a party as a substitute for the proper action to be taken, nor does it imply any right to have the fatal effect of an intentional step cancelled, even if this step later on proved to have been a mistake. A party thus cannot deliberately abstain from fulfilling the conditions for a valid appeal, and then achieve an appellate review by way of a request for re-establishment of rights. The party in question must have been objectively unable to observe the time limit.
- 2.5 The Appellant however chose not to lodge an appeal. The reason given was that he was unable to evaluate the decision under appeal, more in particular the grounds for which marks were or were not given, and possible flaws of the examination procedure, before he knew of

the Examiner's Report on 5 November 2007, which was not distributed to him, nor was he in any way informed when it would be accessible to him.

- 2.6 It is constant jurisprudence of the Disciplinary Board of Appeal that EQE Examination Board decisions informing candidates that they have failed the examination do not need to be reasoned (see e.g. D 12/97, OJ EPO 199, 566 and, as to the constitutional/fundamental rights aspect, the decision 2 BvR 2368/99 of the Federal German Constitutional Court). Nor is there an obligation of the EPO to distribute the Examiner's Report(s) to each candidate or to inform him/her individually of the point in time on which it would be available to him/her (here, by the way, the latest on 9 August 2007 in the afternoon in the internet). This being so the Appellant cannot be considered to have been, for this reason, unable within the meaning of Article 24(2) RDR to perform in time the acts necessary for a valid appeal against the decision under review.
3. As to the separate reason originally relied on, but not pursued further by the Appellant, namely his alleged absence for vacations before and after his marriage on 18 August 2007, it is pointed out that the decision under review was served to him personally on 29 August 2007 and that he has not indicated - and even less adduced any evidence for - the duration of his absence; nor has he shown why that prevented him from performing the required acts in question (starting with the filing of the notice of appeal, which is a formal act anyway, and arranging for the payment of the appeal fee, which can be made by any person, within a full month

following the notification of the decision). Under these circumstances it cannot be established that for that other reason the Appellant, in spite of all due care required by the circumstances, was unable within the meaning of Article 24(2) RDR (cf. jurisprudence to Article 122 EPC 1973) to observe the relevant time limits (including that of two months for filing the statement setting out the grounds for the appeal).

Order

For these reasons it is decided that:

1. The request for re-establishment of rights is refused.
2. The appeal is rejected as inadmissible.

The Registrar:

The Chairman:

P. Martorana

J.-P. Seitz