



Case Number: D 0014/08

D E C I S I O N
of the Disciplinary Board of Appeal
of 23 July 2009

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated
11 August 2008.

Composition of the Board:

Chairman: P. Messerli
Members: E. Dufrasne
P. Gendraud

Summary of Facts and Submissions

I. By letter dated 11 August 2008, the appellant was informed of the decision of the Examination Board of 1 August 2008 that he had not been successful in the European qualifying examination (hereafter "EQE") held from 4 to 6 March 2008.

His performance had been marked as follows:

paper A: 47

paper B: 42

paper C: 0

paper D: 0

II. Notice of appeal against this decision was filed on 22 September 2008. The appeal fee was paid on the same day. The statement setting out the grounds of appeal was received on 21 October 2008, requesting that the decision be set aside and that the appellant's paper A be reconsidered and given a new marking.

III. The appellant's submissions in his grounds of appeal, completed in his letter dated 15 June 2009, can be summarised as follows.

(a) The appellant first relied on infringement of Articles 16 and 17 of the Regulation on the European qualifying examination for professional representatives (Supplement to OJ 12/2007, p.1, hereafter "REE") and Rules 3, 4 and 6 of the Implementing provisions to the Regulation on the European qualifying examination (Supplement to OJ 12/2007, p.15, hereafter "IP REE"). He alleged that, as a matter of fact, a comparison between

claim 1 of his paper A, and the corresponding claim according to the Examiner's report and to the "Possible Solution" published in the Compendium, did only reveal minor errors but no differences such as to explain a mark lower than 50. In particular, he did not understand where 20 points on 40 had been lost in drafting the first independent claim, when all the main features indicated in the Examiner's Report were present in his independent claim, with exception of feature (c), however included in his dependent claim 11. On that basis, he considered having evidenced the existence of serious and obvious mistakes which can be established without re-opening the entire marking procedures.

(b) He further remarked that he had written his paper in a language other than his mother tongue and he feared that he may have been penalised on that basis.

IV. By letters from the Board dated 21 November 2008, the Presidents of the European Patent Office and of the Council of the Institute of Professional Representatives were respectively invited, pursuant to Article 27(4) REE and Article 12 of the Regulation on discipline for professional representatives, to comment on the case. No such comments were received.

V. In a communication dated 3 April 2009, the Board informed the appellant of its preliminary opinion that, on the grounds of appeal presented before it, the appeal would have to be dismissed.

Reasons for the Decision

1. The appeal is admissible.
2. It is well established by the jurisprudence of the Disciplinary Board of Appeal that it only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the REE or a provision implementing the REE. This follows from Article 27(1) REE which reads:
"An appeal shall lie from decisions of the Board and the Secretariat only on grounds of infringement of the Regulation or of any provision relating to its implementation."

Thus the Disciplinary Board cannot reconsider the examination procedure on its merits nor can it entertain claims that papers should have been marked differently, save to the extent of mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure (see e.g. D 1/92, OJ EPO 1993, 357, points 3-5 of the reasons and D 6/92, OJ EPO 1993, 361, points 5-6 of the reasons).

Otherwise, differences of opinion with regard to the number of marks to be awarded for a given answer are a reflection of value judgements which are not, in principle, subject to judicial review (see D 1/92, above cit., point 4 of the reasons). It is not within the competence of the Board to reconsider the examination procedure itself on its merits, i.e. the quality of the candidate's work.

Further, the burden of establishing serious and obvious mistakes necessarily lies with the appellant who alleges it (D 46/07 of 21 July 2007, point 7 of the reasons, unpublished in the OJ EPO).

The appellant's arguments must be seen in the light of these principles based on the legal rule.

3. In the present case, the appellant stated that he did not understand where 20 points on 40 had been lost in the drafting of the first independent claim when he only saw minor errors and the single feature (c) missing in comparison with the corresponding claim according to the Examiner's Report.

The Board does not share that view.

Without wanting to enter into a reexamination of the appellant's work, which is not its task, the Board would like to simply note the following.

First, the missing in feature (c) of the function of the second part as a counter-weight for the first part seems to be important in the definition of the device. The appellant alleged that this is mentioned in claim 11 of his paper. Apart from the fact that there are two dependent claims 11 in the appellant's paper (in his submission dated 15 June 2009, he referred to claim 10, which seems to be an error), the mention of this function in a dependent claim is irrelevant in assessing the scope of the candidate's first independent claim 1 and therefore in marking its paper.

Furthermore, the position of the fulcrum is neither structurally described in corresponding feature (d) nor clearly functionally defined in feature (e) of the candidate's first independent claim. That is another significant difference with the corresponding claim according to the Examiner's Report, with the consequence that such a claim risked lacking clarity (see Examiner's remarks concerning feature (d)).

It appears from that analysis that at least important features were missing in the candidate's first independent claim, which can form the basis for a loss of marks.

Further, the Board considers that the appellant has merely developed that his opinion and the one of the examiners as to the merit of his answers are different, as reflection of value judgement not subject to the judicial review by the Board (see point 2 above).

The Board is therefore of the opinion that none of the arguments raised by the appellant on that basis can establish a serious and obvious mistake in the marking of his copy, i.e. an error amounting to a violation of the REE or of the IP REE.

4. As regards the language argument incidentally raised by the Appellant, the Disciplinary Board of Appeal considered already in D 2/95 (22 April 1996, unpublished, point 6 of the Reasons) not to be an infringement of the existing legislation that the time allowed inconveniences candidates whose first language is not one of the official languages. Further, the Disciplinary Board of Appeal decided in D 9/96

(9 March 1998, unpublished, point 3.4-3.6 of the Reasons) that the inevitably different circumstances of candidates whose native language is not one of the official languages do not justify any additional bonus to be given to candidates whose mother tongue is not one of the official languages. These decisions were confirmed in D 30/05 (24 November 2006, unpublished).

5. Therefore, on the grounds of appeal before the Board, the appeal is to be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

P. Messerli