



**Case Number:** D 0016/08

**D E C I S I O N**  
**of the Disciplinary Board of Appeal**  
**of 17 February 2010**

**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:** J.-P. Seitz  
**Members:** H. Preglau  
B. van Wezenbeek

## **Summary of Facts and Submissions**

- I. The appellant was not successful in passing the European qualifying examination (EQE) which was held from 4 to 6 March 2008. For paper B only 25 points were awarded. The appeal is against this decision of the Examination Committee dated 11 August 2008. Notice of appeal was received on 2 September 2008, the statement of grounds of appeal were received on 22 October 2008. The appeal fee was paid on 1 September 2008.
- II. The President of the Office and the President of the Institute of Professional Representatives were invited to comment on the case. No comments were received.
- III. The arguments of the appellant can be summarized as follows:  
According to the understanding of the appellant the amendment of claim 1 as proposed by him had not been accepted as a possible solution because of an error by the examiner. Therefore points were lost for the argumentation on novelty and inventiveness. In the further argumentation a long and detailed analysis of the answer of the candidate compared with the solution envisaged by the Examination Committee was carried out.
- IV. The appellant also stated that higher-ranking law was infringed because the decision amounted to arbitrariness; it would be a grave injustice to disadvantage a candidate over another without any legal basis for such a treatment. The Examiner's report contained an injustice that was apparent without going into any depth regarding the subject-matter itself.

V. In preparation of the oral proceedings the Board issued a communication drawing the attention of the appellant to its restricted competence to review decisions of the Examination Board.

VI. In a further letter dated 23 November 2009 the appellant stated again that his arguments could be followed by the Board without an in-depth analysis of the answers provided in the examination paper. Whether the revision required an in-depth analysis or not could not be a precondition to the question of whether a provision relating to the application of the REE had been violated.

If the Board had unanswerable questions on the technical or legal complexity regarding the examination paper itself, which had relevance for the actual determination of whether a technical or legal mistake had been made the establishment of an expert opinion under Article 117(e) EPC together with Article 25 of the Regulation on Discipline for Professional Representatives would be requested.

VII. He further argued that the Board could establish the obviousness of the error from prima facie logic because the marking scheme as reflected in the examiner's report had contained an injustice. It had violated the higher-ranking principle of the rule of law and therefore would fall within the scope of errors which the Board should take into account.

VIII. The REE would not state that an in-depth examination of a candidate's work in the light of the solution presented by the Examination Committee might not be

conducted, if it would be necessary to determine a violation of the REE. Instead the Board would be compelled to examine any infringement and if necessary would also have to make an in-depth analysis of the specific marking of the work of a candidate.

IX. According to the appellant Article 16 REE had been infringed and also higher ranking law because the appellant had been unequally treated over other candidates. To understand that injustice no in-depth analysis or reopening of the marking procedure would be necessary but could be derived by pure arithmetic logic. The marking scheme had afforded 5 points for a novel main solution claim. The appellant put forward a claim which had an additional feature over a new solution and therefore must also be novel. He should have been entitled to 5 points. As he did not get those points he was unequally treated over other candidates. Based upon that he also lost points for argumentation.

X. Factual and legal errors should be penalised by the Board as it was stated in point 4.3.2. of D 23/08. The statements of the examiner's report would be evidence, that the Examination Committee had wilfully disregarded the possibility of a redefinition of the technical problem of the invention. As there was no basis for not allowing the redefining of the problem it was legally incorrect. It would be every day practice in real-life situations. As the appellant had found an alternative solution which was evidently not intended by the examiner, but was good practice, showed that the appellant had understood the principles of prosecution before the EPO and was therefore fit to practice before the EPO.

- XI. Concerning alternative solutions reference was made to D\_x/xx of 2008 as well as D 40/07. In the view of the appellant the present case would be identical to that dealt with in the before mentioned decisions.
- XII. As the summons to oral proceedings had not been delivered in due time because of a postal delivery problem the Board postponed the oral proceeding originally scheduled for 26 November 2009 to 17 February 2010.
- XIII. In the course of the oral proceedings the appellant reiterated his arguments. The representative of the President stated, that she could not see any infringement of legal provisions nor obvious errors, made by the examiners or the Examination Committee.
- XIV. The appellant requested, that the decision by the Examination Board be set aside, and that the Board orders the Examination Board to commission the responsible Examination Committee to re-mark the paper B of the candidate based on revised instructions, with the award of marks in accordance with Rule 4(2) and (3) of the implementing provisions of the REE, taking into account the merits of any solution to each subsection of the exam and as an auxiliary motion to set aside the decision of the Examination Board regarding the unsuccessful result of the candidate 103 in the EQE March 2008.

## Reasons for the Decision

1. The appeal is admissible.
2. The Disciplinary Board of Appeal has competence to review decisions of the Examination Board and therefore the marking based on which the decision was taken if the provisions of the REE, its implementing provisions or higher ranking law have been violated (Article 27(1) REE). In the light of the constant jurisprudence of the Disciplinary Board of Appeal a reconsideration of the examination procedure as to its merits does not fall within its competence, unless there were serious and obvious mistakes, which could be detected without re-opening of the whole examination procedure.
3. According to the appellant higher-ranking law was infringed because he was only given 6 out of 16 possible marks because of the non-acceptance of his presented solution for a claim to be drafted . The appellant did not explain where the substantial and obvious error of the examiner should be found but criticized the award of full points for solutions which according to his opinion were wrong and therefore a violation of Article 123(2) EPC. The appellant only commented on the quality of his proposed solution in comparison with the, in his view wrong, solution in the Examiner's report going into technical details of his paper.
4. The appellant's argumentation is mainly based on his own opinion and evaluation as to the merits of his work which differ from the judgement of the examiners. This divergence in opinion between the appellant and the

examiners of his paper cannot be taken as an infringement as such of provisions of the REE or higher-ranking law, meaning an unlawful treatment of the appellant in the way of an arbitrarily low award of points. Examinations always also contain a subjective element and therefore the outcome of an evaluation carried out by different people may also differ. That the appellant is of the opinion that his proposed solution for the task being set in the examination paper is better than the examiners think just shows this subjective element, but cannot be understood as an unlawful treatment of the appellant.

5. The decisions cited by the appellant cannot help, as D 40/07 only states that every candidate has the right to individual marking taking into consideration all aspects of his paper instead of being awarded a global amount of points. As mentioned above, the appellant was not awarded an arbitrary amount of points for his answer. The Record of the Candidate's Results (Schedule of marks) shows that the marks had been given in a detailed manner. In D 23/08 the Disciplinary Board found amongst other things that a technical review of an answer in terms of whether it is objectively correct or appropriate is prohibited by Article 27(1) REE.
  
6. In the Board's view there are also no legally or technically false premises to be found in the examination paper but a different understanding on the appellant's side of the indications in paper B and even more in the jurisprudence cited in the grounds of appeal with respect to novelty and inventive step assessment.

7. The Instructions to Candidates for preparing their answers state under point 11, second paragraph that the claim should afford the broadest possible protection while meeting the requirement of the convention. If a candidate drafts a claim which is in accordance with the convention but does not give the broadest possible protection, the candidate has failed to do everything to set an applicant in the best possible position, that is to get a patent with the broadest scope of protection. Not every solution, different from the intended one by the examiners and explained in the Examination Report has to be accepted per se as a possible one, only because it would be in accordance with the EPC. It has to fulfil further criteria so that it would fit with the request mentioned in the Instructions for Candidates, that is to afford the broadest possible protection. Every unnecessary restriction of a claim would mean a disadvantage for an applicant. therefore an additional feature might still render a claim novel, but might on the other hand not ensure the broadest scope of protection.
8. The same applies to a redefining of a problem. Under particular circumstances this might become necessary if in the course of a proceedings it figures out, that the original definition of a problem no longer fitted with the proposed solution in the light of prior art. As the primarily intended problem-solution approach showed that it was too ambitious, another more restricted definition has to be found, which means also a reduction of the scope of protection. In the paper B under consideration there was another solution expected to be found by the candidates, and no redefining was mentioned as one of several possible attempts to draft



a claim according to the request for finding the broadest possible solution.

9. As the Board was not confronted with unanswerable questions there was also no need for dealing further with the request of the appellant to call for expert opinions. There is also no need to hear witnesses whether the solution of the candidate might be acceptable under the provisions of the EPC. There might be a solution in principle acceptable under the EPC but it might not be the best for an applicant. And it should be the task of a representative before the EPO to find the best possible solution for his client, because this is what will be expected from him in practice.
  
10. The Board came to the conclusion that neither substantial errors or obvious mistakes had been made in marking the appellant's paper nor was he unlawfully treated by not being awarded more points. Concerning the auxiliary request to set aside the decision of the Examining Board, it has to be noted that there is no legal basis for merely setting aside a decision without any further ruling.

**Order**

**For these reasons it is decided that:**

The appeal is dismissed.

The Registrar:

The Chairman:

P. Martorana

J.-P. Seitz