



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
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Case Number: D 0005/18

D E C I S I O N
of the Disciplinary Board of Appeal
of 11 July 2019

Appellant: N.N.

Decision under appeal: Decision of the Examination Secretariat of 6 March 2018 refusing the application for registration for the European qualifying examination under Article 11(1)(a) REE and Rule 11(2) IPREE.

Composition of the Board:

Chairman: G. Weiss
Members: L. Bühler
D. Korper Žemva

Summary of Facts and Submissions

- I. The appeal lies from the Examination Secretariat's finding of 6 March 2018 that the conditions laid down in Article 11(1)(a) Regulation on the European qualifying examination for professional representatives (REE, OJ EPO 2017, Supplementary publication 2, 2) and Rule 11(2) Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 2017, Supplementary publication 2, 18) for registration for the European qualifying examination had not been fulfilled. The Examination Secretariat held that the scientific or technical proportion of the appellant's Master of Science degree in Industrial Engineering and Management, on which the request for registration she had filed with the Examination Secretariat was based, amounted to a maximum of 51% (153 out of 300 credits) only.
- II. By letter dated 5 April 2018, the appellant appealed this decision. She argued that she had been awarded a Bachelor of Science degree as an integral part of her master's degree. The bachelor's degree had a scientific and/or technical proportion of 90.6% (163 out of 180 credits). Upon enquiry by the Examination Secretariat, the appellant provided further evidence.
- III. By letter dated 11 June 2018 the Examination Secretariat informed the appellant that, even having taken into account the new facts submitted with the appeal, it had decided not to rectify its decision and to refer the appeal to the Disciplinary Board of Appeal (Appeal Board). The Examination Secretariat gave reasons for its decision.

- IV. By letters dated 19 July 2018 and 14 August 2018, the appellant filed further arguments and documents.
- V. The President of the Council of the EPO and the President of the European Patent Office were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2017, Supplementary publication 1, 127) in conjunction with Article 24(4) REE.
- VI. By communication dated 30 January 2019, the Appeal Board conveyed its preliminary opinion.
- VII. The appellant responded by letter dated 28 March 2019.
- VIII. The appellant's arguments may be summarised as follows:
- Since fewer courses in total were needed for a bachelor's degree (in the present case, 144 credits as opposed to 240 credits for a master's degree), the fact that Rule 11(2) IPREE required an 80% proportion of scientific or technical courses amounted to discriminating against a master's degree, even though such a degree was considered to be a degree of second cycle and required longer studies. The registration should be based on the appellant's Bachelor of Science degree in Industrial Engineering and Management.
 - It was not correct that the courses in mathematics were not accounted for in full. There was no basis for determining the focus of the studies in order to differentiate between those courses in mathematics

that were a prerequisite for the understanding of other subjects and those that were not. Besides, the Examination Secretariat's finding was factually incorrect.

- The following courses concerned mathematics and should be taken fully into account:
 - "Introduction to Operations Research" (6 credits; only 3 acknowledged)
 - "Operation Research, Extended Course" (4 credits; only 2 acknowledged)
 - "Economic Analysis: Economic Theory" (4 credits; 0 acknowledged)
 - "Economic Analysis: Decision- and Financial Methodology" (6 credits; 0 acknowledged)
- The following course should be taken into account at 50%:
 - "Productions and Operations Management". (6 credits; 0 acknowledged)
- The technical or scientific proportion of her Bachelor of Science degree in Industrial Engineering and Management was thus at least 82.8%. If additional courses she had taken in years 4 and 5 (after the required three years of study for obtaining the bachelor's degree) were taken into account, the proportion was even higher (95%).

IX. The appellant requested that the decision under appeal be set aside and that the case be remitted to the Examination Secretariat for further prosecution.

Reasons for the Decision

1. *Fresh case on appeal*

1.1 Whereas the appellant's request to the Examination Secretariat for registration for the European qualifying examination was based on her Master of Science degree in Industrial Engineering and Management, she argued on appeal that she had been awarded a Bachelor of Science degree as an integral part of her master's degree, and requested registration on the basis of that bachelor's degree.

1.2 The Examination Secretariat can decide on a request for registration for the European qualifying examination only on the basis of the facts and evidence submitted by the candidate. A candidate who wants a decision in his or her favour must therefore submit appropriate evidence and information together with the request for registration on his or her own initiative.

1.3 Moreover, it is not the purpose of the appeal proceedings pursuant to Article 24(1) REE to give the appellant the opportunity to amend his or her initial request for registration as he or she sees fit. Indeed, Article 24(1) REE provides that an appeal lies from decisions of the Examination Board and the Secretariat only on grounds of infringement of the REE or any provision relating to its application. As a rule, therefore, such decisions may be reviewed by the Appeal Board only for the purposes of establishing whether they infringed the REE, provisions relating to its application or higher-ranking law (D 1/92, OJ EPO 1993, 357; D 6/92, OJ EPO 1993, 361). It is normally not for

the Appeal Board to decide in place of the Examination Secretariat on a request for registration which is based on facts which have been presented for the first time on appeal.

1.4 The present case is exceptional in that the appeal is based on a different qualification from that underlying the appellant's initial request for registration for the European qualifying examination. The Appeal Board acknowledges that there is an overlap in that the appellant argues that her bachelor's degree was part of her master's degree and that the legal question of which courses have to be taken into account in determining the scientific or technical proportion of her qualification remains unaltered. The newly presented facts and evidence nevertheless require a fresh assessment of which courses counted towards the appellant's bachelor's degree and how much of this degree was devoted to scientific or technical subjects. In this respect the Appeal Board notes that the appellant's statement of grounds of appeal did not contain her complete case. Rather, additional facts, arguments and evidence were presented with letters dated 24 May 2018, 19 July 2018 and 14 August 2018, thus even after the case had been referred to the Appeal Board. Moreover, the confirmation letters filed with the appellant's last submissions are based on course hours and raise the new issue of whether the number of course hours is proportional to the credits specified in the appellant's bachelor's degree.

1.5 Where new facts and evidence submitted on appeal require that the Appeal Board reassess in place of the Examination Secretariat whether the conditions for registration for the European qualifying examination

laid down in Article 11(1)(a) REE and Rule 11 IPREE have been fulfilled, several options are open to it as to how to proceed.

Pursuant to Article 24(4) REE in conjunction with Article 25(1) RDR and Article 114(2) EPC, the Appeal Board may disregard facts or evidence which are not submitted in due time. However, if such new facts and evidence are disregarded and the appeal is dismissed, the question is then whether the dismissal precludes the filing of a new request for registration with the Examination Secretariat which is based on the facts and evidence on which the appellant was unable to rely in the appeal proceedings and on which no substantive decision has been taken. Should the matter not be regarded as definitively settled by the Appeal Board's decision, a new request for registration may be filed, which will lead to a further decision by the Examination Secretariat that is likewise open to appeal.

Another option available to the Appeal Board is to take the new facts and evidence into consideration but restrict its review to examining whether the Examination Secretariat contravened the Regulation on the European qualifying examination for professional representatives or any provision relating to its application (Article 24(1) REE) and/or whether those new facts and evidence are likely to have a bearing on the outcome of the case. Should the Appeal Board's review reveal that the decision under appeal infringes the legal provisions and/or that the new facts and evidence are liable to deprive the decision of its basis, it may remit the case to the Examination Secretariat for consideration of those new facts and evidence (Article 24(4) REE in

conjunction with Article 25 RDR and Article 12 of the Additional Rules of Procedure of the Disciplinary Board of Appeal, OJ EPO 2019, Supplementary publication 1, 50), especially if settling the matter involves a discretionary decision. While the conditions laid down in Article 11(1)(a) REE and Rule 11 IPREE for registration for the European qualifying examination leave little room for taking factors into consideration which are not explicitly addressed in these provisions, the Examination Secretariat still retains a certain amount of discretion when evaluating a candidate's qualification for the purposes of deciding on his or her registration for the European qualifying examination.

Lastly, depending on the particular circumstances, it may even be appropriate for the Appeal Board not only to admit the new facts and evidence into the appeal proceedings but also to decide on the registration in place of the Examination Secretariat.

1.6 In the present case, in view of the reassessment required and the possible need for further evidence, the Appeal Board limited its review to examining whether the Examination Secretariat contravened the Regulation on the European qualifying examination for professional representatives or any provision relating to its application.

2. *Interlocutory revision*

2.1 While the Appeal Board appreciates that the Examination Secretariat's way of dealing with the new factual situation in the present case was aimed at avoiding consecutive appeals, it nevertheless finds that the

Examination Secretariat exceeded its powers under Article 24(3), first sentence, REE because, despite having formally decided not to rectify its decision of 6 March 2018, it also gave reasons, in its letter dated 11 June 2018, as to why it considered the appeal not to be allowable. It thus decided de facto that the conditions laid down in Article 11(1)(a) REE and Rule 11(2) IPREE for registration for the European qualifying examination were not fulfilled even if the appellant's submissions on appeal were taken into account.

- 2.2 As an exception to the devolutive effect of an appeal, Article 24(3), first sentence, REE empowers the Examination Secretariat to rectify its decision if it considers the appeal to be admissible and well-founded. It can thus take a decision to the effect that it grants rectification by setting aside the decision under appeal if the reasons for this decision no longer hold in the light of the submissions on appeal. If, however, the Examination Secretariat considers the appeal to be either inadmissible or unfounded, it has to refer the case to the Appeal Board without giving reasons since such reasons would amount to a decision on the merits of the appeal. Therefore, given that the appellant had presented new facts and evidence which deprived the contested decision of its factual basis (as rightly acknowledged by the Examination Secretariat in point 2.1 of its letter of 11 June 2018), the Examination Secretariat could have either set aside its decision dated 6 March 2018 and resumed the registration procedure with a view to taking a decision based on the newly presented facts (which would have given the appellant more time to produce additional evidence) or

referred the case to the Appeal Board without further ado. In the Appeal Board's opinion, there is a lot to be said for the first option as it can help to avoid procedural ping-pong between the bodies deciding at different instances and so to ensure procedural economy.

2.3 Nevertheless, the fact that the Examination Secretariat exceeded its powers under Article 24(3), first sentence, REE has no consequences for the present appeal proceedings. The Appeal Board, in line with Article 24(1) REE, examined whether the findings by the Examination Secretariat of 6 March 2018 infringed the REE, any provision relating to its application or higher-ranking law.

3. *Discrimination*

3.1 In the Appeal Board's opinion, the alleged discrimination against a master's degree as compared with a bachelor's degree is not persuasive.

3.2 Article 11(1)(a) REE stipulates that candidates are to be registered for examination provided that they possess a university-level scientific or technical qualification, or an equivalent level of scientific or technical knowledge, as defined in the IPREE. Rule 11(1) IPREE provides that the necessary qualification is a university-level scientific or technical bachelor's degree or equivalent. In accordance with Rule 11(2) IPREE, this degree must have been awarded at the end of a full-time course with a minimum duration of three years and at least 80% of the course hours taken to obtain it must have been devoted to scientific and/or technical subjects.

3.3 Rule 11(1) and (2) IPREE thus defines the minimum level of scientific or technical qualification required for registration of a candidate under Article 11(1)(a) REE. A master's degree at university level is not required for registration. In the present case, the appellant chose, of her own volition, to rely on her master's degree when applying for registration. Therefore, the appellant's complaint of discrimination against candidates with a master's degree as compared with candidates with a bachelor's degree is misplaced in that she too could have based her initial request for registration on her bachelor's degree but failed to do so. The Examination Secretariat can decide only on the basis of the facts and evidence submitted by a candidate.

3.4 Besides, the Appeal Board notes that the legislator was conscious not only of the fact that different technical or scientific studies may require different numbers of course hours but also that there may be differences due to differing academic levels. Indeed, such differences are acknowledged even within the framework of qualifications for the European Higher Education Area adopted at the Bergen Conference of European Ministers Responsible for Higher Education differences exist: a bachelor's degree is awarded at the end of a first cycle of higher education involving a total of 180 to 240 credits based on the European Credit Transfer and Accumulation System (ECTS) and a minimum of 60 ECTS credits per academic year. A master's degree is awarded at the end of a second cycle of higher education involving 90 to 120 ECTS credits. For the purpose of registration for the European qualifying examination the

legislator accepted that the candidates' individual qualifications might vary depending on their individual educational choices. Where a university-level degree obtained by a candidate exceeds the minimum requirements in Rule 11(1) and (2) IPREE, it offers that candidate an alternative to the equivalent level of scientific or technical knowledge as defined in Rule 14 IPREE (ten years' practical experience). A master's degree thus enables a candidate to achieve the 80% proportion of scientific or technical courses required for registration where that proportion has not been achieved on the basis of a bachelor's degree.

- 3.5 As to the scientific or technical proportion of the course hours taken to obtain a bachelor's or master's degree, Rule 11(2) EPC is not deficient in that it makes no distinction between differing academic levels. If, as proposed by the appellant, the required proportion of course hours devoted to scientific or technical subjects were to be reduced for a degree at a higher academic level than a bachelor's degree, a master's course could be less focused on scientific or technical subjects than a bachelor's degree. This would run counter to the requirement of a scientific or technical qualification. As held in decision D 9/14 of 30 January 2015 (point 12), the REE and its implementing regulation leave no room for adjusting the basis for calculating whether 80% of a degree was devoted to scientific or technical subjects by reference to a "standard" full-time course with a minimum duration of three years.

4. *Basis for calculation and eligible scientific or technical subjects*

4.1 The Appeal Board agrees with the finding in decision D 9/14 of 30 January 2015 (point 11) that if there is a discrepancy between the result of a calculation based on course hours and that of a calculation based on credits, the former result is authoritative. However, the Appeal Board also acknowledged in decision D 9/14 that many educational establishments issue certificates showing only the awarded credits, but not the course hours. In such a situation, although the rules do not expressly provide for the possibility of calculating on the basis of credits whether the requirement of 80% of technical or scientific course hours in Rule 11(2) IPREE has been met, the Examination Secretariat may rely on such credits as the basis for its calculation if it is satisfied that the credits awarded are essentially proportional to the number of course hours. Nevertheless, where information and evidence provided by a candidate in support of his or her request for registration relate, as in the present case, to credits only, the Examination Secretariat cannot reasonably be expected to carry out its own investigations. It would, however, be appropriate for the Examination Secretariat to draw the candidate's attention to the precedence given to a calculation based on course hours. Where the alternatives are refusing a request for registration for lack of evidence as to the course hours taken or calculating on the basis of credits whether the 80% proportion of technical or scientific course hours required in Rule 11(2) IPREE has been achieved, the latter should be given precedence in accordance with the principle of proportionality.

4.2 For studies completed on the basis of the European Credit Transfer and Accumulation System (ECTS), 60 credits are allocated to the workload associated with a full-time academic year, which ranges from 1 500 to 1 800 hours of work. This means that one credit corresponds to 25 to 30 hours of work. Under the ECTS, workload is an estimation of the time an individual typically needs to complete all learning activities such as lectures, seminars, projects, practical work, internships and individual study required to achieve the defined learning outcomes in formal learning environments. The credits awarded therefore do not strictly correlate with "course hours" within the meaning of Rule 11(2) IPREE but include time allocated for learning activities other than course units. Where this difference might have a bearing on the calculation of whether the requirement of 80% technical or scientific course hours in Rule 11(2) IPREE has been met, it is for the candidate seeking registration for the European qualifying examination with the Examination Secretariat to substantiate, together with the request for registration, that this is the case by providing suitable evidence from the academic institutions. However, the calculation cannot be based on both credits and course hours, with the former being taken as the basis for some subjects of the candidate's degree and the latter for others.

4.3 As regards the eligible scientific or technical subjects, Rule 13 IPREE provides:

"The scientific and/or technical subjects referred to in Rule 11 shall include biology, biochemistry, chemistry,

construction technology, electricity, electronics, information technology, mathematics, mechanics, medicine, pharmacology and physics."

- 4.4 Thus, mathematics is one of the scientific or technical subjects taken into account to calculate the scientific or technical proportion required pursuant to Rule 11(2) IPREE. Neither the REE nor the provisions relating to its application distinguish between applied and pure mathematics. Nor does it matter whether the subject is taught as part of a specialised or an interdisciplinary course. Therefore, course hours are to be taken into account to the extent that they are devoted to mathematics.
- 4.5 The dispute on appeal is whether and to what extent the courses "Introduction to Operations Research", "Operation Research, Extended Course", "Economic Analysis: Economic Theory", "Economic Analysis: Decision- and Financial Methodology", and "Productions and Operations Management" can be regarded as pertaining to mathematics. The reasons for the Examination Secretariat's assessment of the technical or scientific character and proportion of these courses are not clear. It appears from the decision under appeal dated 6 March 2018 and the letter dated 11 June 2018 that, in the absence of further evidence, the Examination Secretariat relied on the "course contents" section of the course descriptions in the study guide produced by the appellant. This section, however, does not show the proportion of scientific or technical subjects taught in the various courses. The Examination Secretariat seems to have given less or no weight to the "main field of studies" section of these course descriptions. In any

case, the Examination Secretariat's finding, in its letter of 11 June 2018, that "the focus of [the appellant's] studies is not in the scientific/technical field but in interdisciplinary fields of which economics, management and finance form a significant part" not only lacks supporting reasoning but is also irrelevant to the required assessment of whether and to what extent the above courses can be regarded as pertaining to mathematics. In the Appeal Board's opinion, the Examination Secretariat should have either asked for further evidence or refused the request for registration on the ground that the appellant had failed to provide the required information, instead of establishing the scientific or technical proportion of the above-mentioned courses on the basis of inconclusive evidence. For this reason, the decision under appeal dated 6 March 2018 is to be set aside.

5. *Remittal and reimbursement of the appeal fee*

5.1 Following remittal, it will be for the Examination Secretariat to assess whether or not the conditions laid down in Article 11(1)(a) REE and Rule 11(2) IPREE for registration for the European qualifying examination are met on the basis of the facts and evidence submitted by the appellant on appeal with respect to her Bachelor of Science degree and taking into account the above findings by the Appeal Board. It will also have to consider whether the courses taken by the appellant in years 4 and 5 (after the three years of study required to obtain the bachelor's degree) can be taken into account in calculating whether the 80% of technical or scientific course hours required in Rule 11(2) IPREE was

achieved on the basis of the appellant's bachelor's degree.

- 5.2 Since the appellant failed to duly substantiate her initial request for registration and even changed the factual basis for her request on appeal, the Appeal Board does not consider it to be equitable in the circumstances of this case to order the reimbursement of the appeal fee (Article 24(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 Secretariat for further prosecution.

The Registrar:

The Chairman:

N. Michaleczek

G. Weiss