



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 0010/19

D E C I S I O N
of the Disciplinary Board of Appeal
of 5 February 2020

Appellant: N.N.

Decision under appeal: Decision of the Examination Board dated 1 July 2019 concerning the European Qualifying Examination 2019 awarding the grade FAIL for Paper A and deciding that the requirements of Article 14(1) REE have not been met

Composition of the Board:

Chairman: C. Brandt
Members: T. Bokor
S. Colombo

Summary of Facts and Submissions

- I. The appellant sat the 2019 European Qualifying Examination ("EQE"). He appealed, by a notice of appeal received at the EPO on 2 August 2019, against the decision of the Examination Board dated 1 July 2019 that he had not been successful, having been awarded 41 marks for his performance in paper A. The appeal fee was also paid on 31 July 2019.

- II. The Examination Board decided not to rectify its decision, and transmitted the case to the Disciplinary Board of Appeal (hereinafter 'Board') with letter dated 11 September 2019.

- III. In a communication under Article 13(2) of the Additional Rules of Procedure of the Disciplinary Board of Appeal (RPDBA, Supplementary publication 1, OJ EPO 2020, 68) dated 15 January 2020 the Board informed the appellant of its provisional view that the appeal was unlikely to succeed, as the Board did not see any infringement of the applicable provisions. A review of the technical details of the paper and the details of the marking were beyond the competence of the Disciplinary Board of Appeal. Even a more detailed examination did not reveal any manifest error.

- IV. The appellant submitted further arguments with letter dated 23 January 2020. Oral proceedings were held on 5 February 2020 in the absence of the appellant, who has informed the Board of his absence by telefax dated 4 February 2020. Both the President of the European Patent Office (EPO) and the President of the Council of the Institute of Professional Representatives (epi) were informed about the appeal proceedings, and both

Presidents were represented and made observations at the oral proceedings.

- V. In his appeal the appellant argued in essence that his answer paper should have been given more points, given that his device claim was correct both with regard to the facts derivable from the paper and also fulfilled the requirements of the EPC and thereby complied with Rule 23(3) IPREE. In particular, the omission of the "leak-proof resealable opening" feature from his independent device claim was justified. Secondly, he argued that further claims should have been recognised as corresponding dependent and independent claims, instead of being marked as two independent claims of the same category, and that his method claims avoided unnecessary limitations. The erroneous marking violated the provisions of the REE or the IPREE.
- VI. The appellant requested that the marks awarded to his Paper A, in particular the marks awarded to the independent product claim 1 and the two (formally independent) method claims 11 and 15 be re-evaluated by the Board. The appellant requested that the decision of the Examination Board be set aside, and he be awarded at least 45 marks, i.e. at least 4 additional marks to his recognised result of 41 marks, so that his paper could be awarded at least the COMPENSABLE FAIL or PASS grade (Rule 6(3) IPREE). The appellant further requested that his appeal fee be reimbursed under Article 24(3) or (4) REE.
- VII. The decision of the Board was announced at the end of the oral proceedings.

Reasons for the Decision

1. The appeal is admissible.

Shorter notice period, absence of the appellant in the oral proceedings

2. According to Article 24(4), first sentence of the Regulation on the European Qualifying Examination (REE, last published in Supplementary publication 2, OJ EPO 2019, 2) and, *mutatis mutandis*, Article 13(2) of the Regulation on discipline for professional representatives (RDR, Supplementary publication 1 to OJ EPO 2020, 135), Rule 115 EPC applies *mutatis mutandis* to the oral proceedings in the present case. Rule 115(1), second sentence, EPC provides that at least two months' notice of the summons must be given, unless the appellant agrees to a shorter period. In the present case the summons to attend oral proceedings to be held on 5 February 2020 specified a shorter notice period and therefore does not fulfil the requirement of an at least two-month period of notice. The appellant stated with his letter dated 5 January 2020 that the date of 5 February 2020 was acceptable to him and that he agreed to be summoned at short notice. He stated with telefax dated 4 February 2020 that he will not be attending the oral proceedings, and requested a decision on the basis of his written submissions. The absence of the duly summoned appellant from the oral proceedings does not prevent the Board from deciding the appeal, pursuant to Rule 115(2) EPC in conjunction with Article 13(2) RDR.

The appeal grounds

3. Pursuant to Rule 23 of the Implementing provisions to the Regulations on the European qualifying examination for professional representatives (IPREE, last published in Supplementary publication 2, OJ EPO 2019, 18), Paper A expects from candidates that they prepare a patent application on the basis of a letter from a potential applicant to the professional representative. In the EQE 2019 Paper A, the applicant's letter and its attachments concerned a device for culturing cells, having a particular structure, and a corresponding system and method for culturing cells. The instructions of the marking scheme foresaw that candidates prepare an independent product claim directed at a device, and having certain essential features, as explained in more detail below. The complete paper and the Examiner's Report are available on the website of the European Patent Office.
4. The argumentation of the appellant is twofold. Firstly, he argues that the broad scope of his product claim, i.e. the omission of the expected "leak-proof resealable opening" feature was justified. Secondly, he argues that Claims 11 and 15 should have been recognised as corresponding dependent and independent claims. Comparing their subject-matter revealed that the subject-matter of his claim 11 was completely encompassed by that of his claim 15, so that they were to be regarded as an independent and dependent claim. In this manner, treating claim 11 as an independent method claim for the purposes of compliance with Rule 43(2) EPC, and marking it accordingly was wrong.
5. The appellant submits that his solution given for the device claim would have merited more points. He also sets out in the appeal why his solutions may have received less marks than the foreseen maximum marks.

Concerning the device claim, the Board sees no reason to disagree with the appellant that the deduction of 30 marks can best be explained on the basis of point 4.4 of the Examiner's Report. At point 4.4, last sentence, the Examiner's Report state that "claims to a device which were lacking any type of opening or cell culture chamber received a deduction of 30 marks". It is clear from the totality of the appellant's arguments that his device claim did not have any "opening" feature. Rather, he argues that this feature was not essential on the basis of the facts given in the applicant's letter and the other attachments in the Paper A.

6. The reasons for the deduction of 7 marks from the 15 maximum possible marks for the method claims seems less clear for the Board. The exact reasons of the two markers are not apparent from the documents available to the Board. However, the Board sees no reason for not accepting the appellant's hypothesis that the marking of the method claims could have been made on the basis of points 3., 4.11, 4.15 and 4.16 of the Examiner's Report, as set out in the grounds of appeal, page 9 in the middle. Thus it is not unlikely that out of two independent method claims, only one was awarded with marks, namely the one which attracted less marks.
7. The marking of the other (dependent) claims and the description was not objected to in the appeal.

Limited scope of review on appeal, Article 24(1) REE

8. 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 Regulation on the European Qualifying Examination or a provision

implementing it. This follows directly from Article 24(1) REE which reads: "An appeal shall lie from decisions of the Examination Board ... **only on the grounds** that this Regulation or any provision relating to its application has been infringed"(emphasis by the Board). Thus the Disciplinary Board of Appeal may only review Examination Board decisions for the purposes of establishing that they do not infringe the REE, its implementing provisions or a higher-ranking law. It is not the task of the Disciplinary Board of Appeal to reconsider the examination procedure on its merits nor can it entertain claims that papers have been marked incorrectly, save to the extent of mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure. All other claims to the effect that papers have been marked incorrectly are not the responsibility of the Disciplinary Board of Appeal. Value judgments are not, in principle, subject to judicial review. (See, for example, D 1/92 (OJ EPO 1993, 357), points 3-5 of the Reasons; D 6/92 (OJ EPO 1993, 361), points 5-6 of the Reasons; and D 7/05 (OJ EPO 2007, 378), point 20 of the Reasons, all cited in the Case Law of the Boards of Appeal, 9th Edition 2019, Chapter V.C.2.6.3.).

9. The appellant stated that the provisions of the REE or the IPREE were violated during the examination. The identified provisions were Article 6(6) REE and Rule 23(3) IPREE. As far as the Board understands the arguments of the appellant, these provisions are perceived to be infringed, because a candidate relying on the overall purpose of these provisions would have been misled into giving wrong answers, as the example of the appellant demonstrates. He also argued that the mistakes in the marking could be identified without re-opening the whole marking procedure. He also accepted

that the marking scheme as provided in the Examiner's Report was not wrong *per se*, in that "the interpretations set out there were justified", as stated in the appeal, but the mistake was not to recognise by the markers that the appellant's solutions also merited marks. In particular, his solutions gave a broader scope of protection. Contrary to the expectation of the Examiner's Report, the "at least one leak-proof and resealable opening" feature was not essential and therefore should not have been penalised if left out from the expected independent device claim.

10. The Board cannot accept this argument. As held in decision D 6/13 (points 8 and 9 of the Reasons, also cited in CLBA (*supra*), see Chapter V.C.2.6.3, page 1381 in the English edition), it cannot be qualified immediately as an infringement of a provision of the REE or IPREE, if the Examination Board does not "perfectly" fulfil its implied obligation to draw up an impeccable examination paper and corresponding impeccable marking scheme, as such a finding would in the given case require a value judgement, which is normally beyond the powers of the Board. It is noted that decision D 6/13 also dealt with an appeal concerning the marking of the Paper A and an alleged infringement of Rule 23(3) IPREE. As set out in D 7/05 (OJ EPO 2007, 378, 394 *et seq.*), the Board can only consider facts constituting a mistake in the examination procedure which can be established without re-opening the whole marking procedure. The actual marking of examination performance in terms of how many marks an answer deserves is not subject to review by the Board. Nor are the Examination Board's criteria for determining the weighting of the expected answers (*cf.* D 20/96, point 9 of the Reasons) to the examination questions (D 13/02, point 5 of the Reasons).

11. Firstly, the Board notes that contrary to the opinion of the appellant, establishing the error in the marking without a substantial re-examination of the paper A does not seem possible. This is apparent from the totality of the argumentation of the appellant, namely the necessity of referring to the overall content of the Paper A and his answer paper. For the Board this demonstrates that the issues raised by the appellant are difficult, if not impossible to judge without effectively requiring a complete re-examination of the whole paper A and his answer paper. The last written submissions of the appellant in its letter of 23 January 2020 only reinforces that the arguments of the appellant can only be understood and examined if the totality of the paper A is analysed in detail.

12. In addition, it is clear to the Board that the examination of the question whether his solutions are also acceptable would require value judgments referred to in point 10 above. For the Board, it is beyond doubt that the decision whether a given claim, while not corresponding to the expected example, is in fact correct or not for the purposes of the paper A would certainly be a value judgment, in the sense that this would require a careful technical assessment of the claim against the whole examination documentation.

13. On this basis, the Board is unable to recognise any violation of the applicable provisions. Article 6(6) REE was obviously complied with, as the Examiner's Report was published. Whether it will enable candidates to prepare for future examinations cannot be judged from the facts of the present case. The scope of Rule 23(3) IPREE in any given case cannot be judged separately from the scope of Rule 22(3) IPREE, the latter requiring candidates to limit themselves to the

facts given in the examination paper, which again would require an examination of these facts. This, in turn demonstrates that the issue is beyond the competence of the Board. As explained below, even when proceeding to examine the totality of facts to be taken into consideration pursuant to Rule 22(3) IPREE, the Board is unable to identify a manifest infringement of Rule 23(3) IPREE in the present case in light of the totality of the facts of the examination paper. Thus these reasons themselves are sufficient for dismissing the appeal. Furthermore, beyond the alleged errors raised by the appellant, the Board itself does not see any other manifest errors either in the examination papers or in the marking instructions in the Examiner's Report or in the marking of the appellant's paper.

14. For the sake of completeness, although such a detailed review of the marking is normally not the task of the Board, as explained above, some additional comments on the arguments of the Appellant are given below.

15. As mentioned above in point 4, the argumentation of the appellant contains two distinct lines of arguments. Firstly, he argues that the broad scope of his product claim, i.e. the omission of the "leak-proof resealable opening" feature was justified. Secondly, he argues that claims 11 and 15 should have been recognised as corresponding dependent and independent claims, instead of being marked as two independent claims of the same category, and that the method claims avoided unnecessary limitations, such as the steps of the cell culturing. As already stated in the Board's communication, the Board holds that none of the two lines of arguments are convincing.

16. As to the proper scope of the independent device claim, the Board is unconvinced that the penalisation of the omission of the expected "leak-proof and resealable opening" feature is a manifest error. In the opinion of the Board, the "Letter from the applicant" in the Paper A contained a number of statements in this regard. It provided a systematic distinction between essential and advantageous features. When the letter identified a clear drawback in the absence of easy access to the cell culture chamber, it immediately stated that the feature to eliminate this drawback is an essential feature. Contrary to the arguments of the appellant, this analysis of the 2019 Paper is not contradicted by the cited 2017 and 2018 Papers A and the corresponding Examiner's Reports, because there the cited features (connected pouches, protrusion height) were not stated to be essential to the inventions described in the client's letter. The argument of the appellant that wordings like "**should** [have a certain height]" already demonstrate essentiality of features in the earlier papers and Examiner's Reports does not convince the Board, as it remains that the feature seen to be essential was only disclosed so in connection with a certain technical effect, but not inevitably for the invention as a whole. Against this background, also taking into account Rule 22(3) IPREE, the marking instructions in the Examiner's Report prescribing the deduction of 30 marks for a missing "leak-proof resealable opening" feature do not seem erroneous to the Board, and even less manifestly erroneous.
17. This assessment of the Board is also not refuted by the appellant's arguments provided in his last submissions of 23 January 2020. There the appellant provided detailed technical explanations how a cell culturing device without an opening could be technically realised

and how it would solve certain problems also addressed by the "Letter from the applicant" or otherwise derivable from the prior art documents in the paper A. The appellant also argued that a proper technical and grammatical analysis of the "Letter from the applicant" would reveal that the opening was not considered essential by the applicant in general, but only for certain embodiments. The appellant also argued at length why this solution would in fact provide a larger scope of protection, while still being novel and inventive. The Board sees no reason to call into question the technical feasibility of the solutions outlined by the appellant and the correctness of the underlying technical explanations. However, this does not change the fact that the embodiments discussed by the appellant are not explicitly disclosed in the "Letter from the applicant", nor derivable from the other documents in the Paper A. In this manner, an examination of these speculative embodiments inevitably raises the question whether such considerations are still within the framework of the paper, as stipulated by Rule 22(3) IPREE. The Board holds that answering the question whether the right balance was struck in the Examiner's Report between this rule and Rule 23(3) IPREE, is undoubtedly a value judgement, not open to the Board as explained above.

18. Looking apart from the limited powers of the Board in this regard, the various ways of introducing cells into the cell culture device, as listed by the appellant in point 9 of his last submissions, seem to go far beyond the facts of the paper A. Furthermore, some of the examples given by the appellant in support of his argumentation, e.g. the introduction of cells by way of fruit flies dispensed on the membrane, seem to be based on special knowledge, contrary to Rule 22(3), last

sentence, IPREE. Thus the Board maintains its opinion that the marking of the device claim in the appellant's paper does not reveal manifest errors.

19. As to the proper relationship between the formally independent method claims 11 and 15, the Board does not see the basis for treating them as not independent. The cited parts of the Guidelines do not seem to provide support for the contention of the appellant that interdependency of claims for the purposes of Rule 43(2) or (4) EPC can also be established through an analysis of the subject-matter of the claims, irrespective of the missing reference to the other (independent) claim. Both the Guidelines (Chapter F-IV 3.4) and Rule 43(4) EPC states that the dependent claim **must/shall** contain a reference to the other claim. In the absence of such a reference, the claims must be considered as independent from each other, purely on a formal basis. It is also clear that the method claims 11 and 15 are not dependent claims by virtue of their reference to the device claims 1-10, see Guidelines, Chapter F-IV 3.8. In this light, it is immaterial if the method claim 15 had a proper scope or not, as the method claim 11 had an unnecessary limitation (see point 4.11 of the Examiner's Report) and this latter served as the basis of the marking according to Section 3 of the Examiner's Report (page 7, 3rd paragraph).
20. This assessment of the Board was known to the appellant from the Board's communication, and was not contradicted by the appellant in his latest submissions.
21. On the basis of the above, the Board does not see any infringement of the applicable provisions of REE or IPREE, nor of any higher ranking law. The Board cannot

see either that the marking was tainted with manifest errors, i.e. errors that are so grave that they can be established without reviewing the totality of the examination paper and re-opening the marking procedure. Therefore, the appeal must be dismissed.

22. The appellant also requested the reimbursement of the appeal fee, but beyond the reference to Articles 24(3) and (4), gave no further reasons for the reimbursement. It is apparent that the reimbursement request under Article 24(3) IPREE was directed at the Examination Board in case of a rectification. The request directed at the Disciplinary Board of Appeal aimed at the reimbursement foreseen by Article 24(4), second sentence, REE when the appeal is allowed. Given that this is not the case, there is no room for the reimbursement of the appeal fee.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:



N. Michaleczek

C.-P. Brandt

Decision electronically authenticated