



**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 0014/19

**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.-P. 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 1 August 2019, against the decision of the Examination Board dated 1 July 2019 that he had not been successful, having been awarded 37 marks for his performance in paper A. The appeal fee was also paid on 26 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. Oral proceedings were held on 5 February 2020, where the appellant submitted further arguments.
- V. 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 at the oral proceedings.

- VI. In his appeal the appellant argued in essence that his answer paper should have been awarded more marks, given that the features of his product claim provided essentially the same scope as the solution set out in the Examiner's Report and the model solution (Candidate's answer). Additionally, he argued that only claiming the generalised feature "leak-proof resealable opening" without the more specific features of those three embodiments which were expected by the Examiner's Report should not have resulted in a deduction either.
- VII. In the oral proceedings the appellant argued that the erroneous marking violated the provisions of the REE or the IPREE, namely Article 1(1) REE. A serious and manifest mistake occurred, which did not require a complete re-evaluation. On a proper interpretation the features of his claim achieved the same effect as the features in the model answer, and the scope of his claim was effectively the same as that of the expected claim as presented in the model answer. It was also an error that the Examination Board did not take into account the possible solution or situation as presented by the appellant.
- VIII. 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 8 additional marks to his recognised result of 37 marks, so that his paper A could be awarded at least the COMPENSABLE FAIL, preferably the PASS grade, in particular by re-considering the 0 marks awarded for the independent product (device) claim.
- IX. 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*

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 did not fulfil the requirement of an at least two-month period of notice. The appellant stated with his letters dated 18 December 2019 and 6 January 2020 that the date of 5 February 2020 was acceptable to him and that he agreed to be summoned at short notice.

### *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 cell culturing 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 his product claim is essentially the same in scope as given by the Examiner's Report and the model solution (Candidate's answer). In particular, his device claim specified two "membranes held within opposing openings of a frame ... to form a cell culture chamber between the membranes and the frame". This feature was essentially equivalent to the expected solution of two "membranes ... attached to opposite sides of the frame ... to form a cell culture chamber between the ... opposing membranes and the frame". Secondly, he argues that claiming only the generalised feature "leak-proof resealable opening" without the more specific features of the two embodiments of the resealable opening, namely a resealable aperture in a frame or a resealable attachment of the membranes to the frame by means of a pressure sensitive adhesive, should not have resulted in a deduction of marks. In his view, omitting the features of the embodiments did not result in a different scope of the claim, if indeed only the disclosed embodiments were technically feasible, so that the scope of his claim was comparable to that of the expected solution also in this respect.
5. The appellant submits that his solution given for the device claim would have merited more marks, and

certainly more than the 0 marks awarded by both markers. He also gives a partial explanation why his solutions may have received less marks than the foreseen maximum marks. He attributes the loss of 30 marks to the fact that his claim does not clearly convey the expected feature that "the cell culture chamber is formed between the two opposing membranes". Without suggesting numbers for the possible deduction, he recognises that the claiming of the "leak-proof resealable opening" feature on its own, i.e. without the features of the expected specific embodiments also lead to deductions affecting his device claim.

6. The marking of his other claims and the description was not objected to in the appeal.

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

7. 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.).

8. The appellant did not state in the grounds of appeal that the provisions of the REE or the IPREE were violated during the examination. In the oral proceedings he argued that Article 1(1) REE was possibly infringed, and that the mistakes in the marking could be identified without re-opening the whole marking procedure. He also submitted that he did not contest the general analysis of the overall information content of the Paper A as laid out in the Examiner's Report, and also accepted which features were necessary for arriving at a novel and inventive product claim. The Board takes from these submissions that the marking scheme as provided in the Examiner's Report was not wrong *per se*, but the mistake was not to recognise by the markers that the appellant's solutions also merited marks. In particular, the markers ignored that the scope of his product claim essentially had the same scope.
9. The Board finds these arguments unconvincing. 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 a comparable case, where the appellant's main objection was that his claim, though different from the expected solution, was in itself correct for the purposes of the paper and therefore should have attracted more marks. 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).

10. The Board has no doubts that the decision whether a given claim, which shows recognisable differences as compared with the expected example, is in fact correct or not for the purposes of the paper A would require both an in-depth examination of the paper and the appellant's answers and in addition also a value judgment. Firstly, the Board would have to perform the in-depth examination of the paper already for establishing the proper scope of the differences, given that it is the main argument of the appellant that these differences, if any, are negligible and should not affect the marking. As explained above, it is settled case law that the Board is barred from entering



into such an in-depth examination of the Paper A and the appellant's answers. However, given that the appellant's claim has features having an undisputedly different wording, the Board must proceed on the presumption that there are also differences in scope, though it may still be plausibly argued that these differences are in fact not significant. But even if the Board were to accept this argument more or less without reservations, namely that the differences compared to the model answer were indeed not significant, this would still require the Board to establish if the recognisable difference over the expected answer is so insignificant that it can be ignored for the purposes of the marking. Apart from the question if this can be made at all without the in-depth examination exercise, the weighting of the significance of the difference would apparently be a value judgement which is also beyond the powers of the Board, as set out above.

11. On this basis, the Board is unable to recognise any violation of the applicable provisions. A violation of Article 1(1) REE in particular is not seen, as it has not been submitted and it is also not apparent to the Board that the Paper A was unsuitable for establishing if a candidate is qualified to practise as a professional representative. As explained below, even when the Board proceeds to examine more in depth the claim features in question, the deductions in the marking can be plausibly explained, thus the results of the marking of the appellant's paper also do not lead to the conclusion that Article 1(1) REE was somehow infringed. 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.

12. 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.
13. As set out in the Board's communication, at least two plausible explanations are apparent to the Board why the product claim was not awarded any marks. This could have been a result of the finding that the claim was not novel (see point 4.1 of the Examiner's Report, resulting in 0 marks), or that the claim was not inventive and also unclear (points 4.2 and 4.6 of the Examiner's Report, resulting in a deduction of 30 + 5 marks). The appellant himself referred to the deduction foreseen for the general feature of the "leak-proof resealable opening" (passage bridging pages 6 and 7 in the Examiner's Report, 7 marks), so that his claim was probably also penalised for this reason. Thus the second possibility is that the aggregated deductions resulted in 0 marks. In the oral proceedings the appellant also accepted that such deductions could indeed explain the marking results of his paper.
14. As mentioned above in point 4, the argumentation of the appellant contains two distinct lines of arguments. Both lines of argument boil down to the assertion that the features of his device claim essentially provided the expected scope. As already stated in the Board's communication, none of the two lines of arguments convinces the Board that the features of the appellant's claim are fully comparable to the expected

answer and fully compatible with the facts of the paper.

15. As to the scope of the "opposing openings" feature, the description of the client consistently required the cell chamber to be formed by opposing membranes, which are taught to be held on opposite sides of a frame (par. 8 of the client's letter). Accordingly, the model answer expected the feature of "two opposite sides of the frame", which is certainly narrower in scope than "opposing openings of a frame". The Board considers that without any further definition of "opposing" in the claim itself, the "opposing openings" may be in any opposing arrangement relative to each other, and not only on opposite sides of the frame, thus leaving a broad interpretation of this term open. On the other hand, if the Board were to follow the claim interpretation on the basis of the description, as argued by the appellant, it would limit the claim to an "upper and lower" arrangement of the openings. None of these features (opposing openings/upper and lower openings) were explicitly disclosed in the description of the invention ("Letter from the applicant"), so it is questionable if the appellant observed the requirements of Rule 22(3) IPREE, requiring candidates to limit themselves to the facts given in the examination paper.
  
16. Furthermore, the appellant also omitted the expected feature of the cell chamber being formed between the opposing membranes and the frame, and he merely claimed that the chamber is formed between the membranes and the frame, thus arguably leaving the possibility open that a cell chamber is formed between the frame and only one of the membranes. The appellant himself pointed at this possibility as an explanation for the

deduction of 30 marks pursuant to point 4.2 of the Examiner's Report. In this light, it is conceivable that the markers deemed the claim not only not inventive, but even not novel over D2, when taking a broad interpretation of opposing openings, possibly extending to juxtaposed openings and membranes, in the absence of any limitation to the term "opposing".

17. Given the broader claims of the appellant and the possible broad interpretation of the term "opposing openings", the inventive step objection by the markers, e.g. starting from D1, also cannot be ruled out, again on the basis of point 4.2 of the Examiner's Report. A clarity objection could also have been raised in view of the term "opposing openings" in the claim without the limitation to the "upper and lower" as defined in the description. In other words, the Board sees plausible explanation for the deductions, though it must be emphasised that the Board has no more information on the details of the marking than the total marks given for the four categories as shown in the Candidate's answer. However, it remains that the Board cannot see manifest errors in the marking.
  
18. The same applies to the presumed deduction of the 7 marks for not claiming the features of the specific embodiments as explained in points 4 and 5 above. In light of the hints given to the candidates in the client's letter ("allows only the three embodiments", systematic distinction between essential and advantageous features) the deduction for the generalisation to the "leak-proof resealable opening" seems justified, at least does not appear manifestly wrong. Summing up, a plausible explanation can be found for the final result of 0 marks for the product claim.

19. This assessment of the Board was also not refuted by the appellant's arguments submitted in the oral proceedings.
  
20. The appellant argues that the error in the marking is apparent also without a complete re-examination of his paper. The Board sees this differently, and maintains its position 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 core arguments of the appellant in his appeal, namely the necessity of providing a detailed interpretation of the features of his claim and a comparison of these to the expected features. The Board also cannot accept that D1 and D2 need not be analysed to establish the error: The appellant himself submits that his claim is also inventive over D2, and also argues in detail why his claim features provide the necessary distinction over D2, by comparing the embodiments covered by his claim to the embodiments suggested by D2. For the Board this demonstrates that the issues raised by the appellant are difficult, if not impossible to judge without effectively requiring a thorough re-examination of a substantial part of the paper A and his answer paper. However, alone this finding of the Board is sufficient to establish that the issue is beyond the powers of the Board.
  
21. The Board can even accept that the technical arguments of the appellant concerning the interpretation and scope of his product claim are plausible and reasonable, and awarding marks for them may not have been wrong. However, this finding in itself is not sufficient for the Board to establish that NOT awarding marks for the appellant's product claim was manifestly

erroneous. As set out above, the fact that the appellant's product claim has features which are worded differently from the expected solution seems undisputed by the appellant, and the answer to the question whether this undisputed difference is still within the acceptable error margin is a value judgement. To answer this question the Board would have to assess whether the facts in the paper were sufficiently clear for a reasonably prepared candidate for arriving at the claim having all the expected features, but not more and not less, i.e. whether the candidates could also have been expected to realise what solutions would not be acceptable. Thus it appears to the Board that this value judgement in fact cannot be separated from an assessment of the difficulty of the examination. However, the difficulty of the examination is an issue falling within the discretionary powers of the Examination Board, and cannot be reviewed by the Disciplinary Board of Appeal (see also D 10/11, point 13 of the Reasons, and D 6/13, point 14 of the Reasons).

22. On the basis of the above assessment, the Board does not see any infringement of the applicable provisions of the 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.

**Order**

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

The appeal is dismissed.

The Registrar:

The Chairman:



N. Michaleczek

C.-P. Brandt

Decision electronically authenticated