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D E C I S I O N
of 18 July 2006

Case Number: T 0260/06 - 3.4.03

Application Number: 98901496.4

Publication Number: 0907306

IPC: H05B 41/24

Language of the proceedings: EN

Title of invention:
Discharge lamp turning-on device

Applicant:
USHIO DENKI KABUSHIKI KAISYA

Opponent:

-

Headword:

-

Relevant legal provisions:
EPC Art. 122

Keyword:
"Restitutio in integrum (no)"

Decisions cited:

-

Catchword:

-



Case Number: T 0260/06 - 3.4.03

D E C I S I O N
of the Technical Board of Appeal 3.4.03
of 18 July 2006

Appellant:

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Decision under appeal:

Decision of the Examining Division of the
European Patent Office posted 16 June 2005
refusing European application No. 98901496.4
pursuant to Article 97(1) EPC.

Composition of the Board:

Chairman: R. G. O'Connell
Members: G. Eliasson
U. Tronser

Summary of Facts and Submissions

I. This is an appeal against the decision of the examining division pronounced at oral proceedings on 31 May 2005 and posted 16 June 2005 refusing European patent application No. 98 901 496.4.

II. On 9 February 2006, the appellant applicant filed a notice of appeal, a statement of grounds of appeal and paid the appeal fee. On the same day he filed an application for *restitutio in integrum* under Article 122 EPC and paid the corresponding fee.

III. At oral proceedings before the board, the appellant applicant requested

1. *restitutio in integrum* ie reestablishment of his rights in relation to the observance of the time limits for filing the notice of appeal, payment of the appeal fee and filing the statement of grounds of appeal

and in the event of *restitutio in integrum* being granted

2. that the decision under appeal be set aside and a patent be granted on the basis of claims filed 31 May 2005 at oral proceedings before the examining division.

IV. The appellant applicant presented essentially the following arguments in support of the application for *restitutio in integrum* under Article 122 EPC:

- (a) The standard procedure for handling incoming post in the office of the appellant applicant's representative ("the office") was as follows:

One staff member ("A") date-stamps every document and puts it into the appropriate file. If there is an official acknowledgement of receipt postcard, this is also stamped and it is placed on top of the stack of related documents.

The file is passed to another staff member ("B"), who is well-trained and experienced, to check the mail for any time limits. Any such time limit is entered along with follow-up dates into the office's computerised diary (docketing) system and a handwritten note of the time limit is entered and signed on the date stamp. Finally, a coloured plastic edge strip is attached to the file wrapper carrying the due date and the reason for the due date.

In the case of oral proceedings before the examining division a follow-up date is entered into the diary system with a reminder with regard to the expected receipt of a decision to grant a patent. The reason for choosing a follow-up date based on a decision to grant was that in many cases a favourable result could be achieved in oral proceedings before the examining division. The follow-up date had the purpose of ensuring that the decision to grant was received within a reasonable time.

In the event that an adverse decision is received the time limit for filing an appeal is entered into the diary system. The diary system calls a file in accordance with the schedules of due dates and reminders four weeks, fifteen days and three days prior to expiry of the terms, and also on the day of expiry. These schedules are compiled from the data entered into the action tables of the diary system. They are printed out daily by staff member B who retrieves the listed files and presents them to the patent attorney dealing with the case.

- (b) In the present case, a follow-up date of 9 December 2005 was entered into the diary system in respect of the present patent application on 31 May 2005, the day of the oral proceedings before the examining division, on the presumption of a decision to grant.

- (c) In the course of processing the incoming post on 17 June 2005, the written decision of the examining division dated 16 June 2005 and the minutes of the oral proceedings from 31 May 2005 were duly date-stamped and placed in a file assigned to record (docket) No. U 374 by staff member A. At this stage, however, the EPO return receipt that had been tucked inside the decision was overlooked by staff member A. As a result, the return receipt was not date-stamped nor was it placed on top of the documents in the file. The file with the post placed inside was subsequently forwarded to staff member B, who was responsible for monitoring of time limits.

- (d) Staff member B processed the file of the present application containing the minutes of the oral proceedings and the refusal decision on 17 June 2006 together with the other incoming post. However, staff member B did not realise that the file contained a refusal decision, since firstly, the minutes of the oral proceedings lying on top of the stack of documents in the file covered the decision so that the decision appeared to be part of the minutes. Secondly, as no return receipt was on top of the documents, staff member B was not alerted to look for any related document in the file. As a result, neither due dates for filing the appeal and for filing the grounds of appeal were entered into the diary system, nor was a coloured plastic edge strip with the due dates attached to the file.
- (e) As staff member B expected that a decision would soon follow under separate cover, B did not cancel the follow-up entry in the docketing system, as the purpose of the follow-up date was to monitor that a (favourable) decision was received within a reasonable time. Pending the imminent receipt of the decision the file was put aside without further processing so that the minutes could be sent to the client together with the decision.
- (f) On 9 December 2005 the file was retrieved through the follow-up date entered in the diary system. Only then was it realised that the terms for filing the appeal and for filing the statement of grounds of appeal had expired.

Reasons for the Decision

Restitutio in integrum and admissibility of the appeal

1. The decision under appeal was dispatched on 16 June 2005. Hence, pursuant to Rule 78(2) EPC, the decision is deemed to have been notified on 26 June 2005. In accordance with Article 108 EPC the term for filing a notice of appeal and paying the appeal fee expired on 26 August 2005 and the term for filing a statement of the grounds of appeal expired on 26 October 2005. These time limits are time limits within the meaning of Article 122(1) EPC, because their non-observance has the direct consequence, by virtue of Rule 65(1) EPC, of causing a loss of right by rendering the appeal inadmissible.

The application for *restitutio in integrum* complies with the formal requirements laid down in Article 122(2) and (3) EPC and is therefore admissible.

2. In order for the request for *restitutio in integrum* to be allowable, the appellant must demonstrate that the time limit for filing an appeal was not observed "in spite of all due care required by the circumstances having been taken" (Article 122(1) EPC). The jurisprudence of the boards of appeal considers that this requirement has been met, if the failure to meet the time limit was due to an isolated mistake in an otherwise reliable system for monitoring time limits (see "Case law of the boards of appeal, 4th Edition", chapter VI.E.5.1.2).

2.1 It follows from the submissions by the appellant applicant that in the course of processing the incoming post on 17 June 2005 the two staff members A and B made the following errors which had as a consequence that the appellant applicant did not meet the respective time limits for filing a notice of appeal, payment of the appeal fee and filing the statement of grounds of appeal:

- The written decision of the examining division dated 16 June 2005 and the minutes of the oral proceedings from 31 May 2005 were duly date-stamped and placed in a file associated with record number U 374 by A, the staff member of the office assigned to this task. A however overlooked the fact that the return receipt was attached to the decision; neither did A search for such a return receipt in the incoming documents.
- The file with the incoming documents for record number U 374 was forwarded to B, the staff member assigned to the task of calculating and monitoring time limits. As no return receipt for a decision was placed on top of the stack of documents in the file, staff member B did not investigate whether the written decision of the examining division was contained in the stack.

2.2 Thus the time limits were missed, not as a result of a single mistake, but as a consequence of two staff members both failing to realize that the incoming post contained a refusal decision. It also appears from the submissions by the representative that no independent

cross-checking between the two staff members took place. In particular, staff member B did not check personally whether the stack of incoming post contained any other documents than the minutes of the oral proceedings but relied completely on the fact that staff member A did not find any return receipt in the incoming post. According to the submissions of the representative the work of the first staff member was of such a nature that it frequently was carried out by apprentices. Hence in accordance with the standard of due care set by the jurisprudence of the boards of appeal, there was an obligation on the other members of the office to check that the incoming documents had been properly identified by the first staff member.

2.3 The board also notes that the diary system of the office was not operated in a manner that could have prevented the time limits from being missed. The follow-up date entered into the diary system on the day of the oral proceedings was selected solely on the assumption that the outcome of the oral proceedings would be a decision to grant a patent. Although it must have been known on the day after the oral proceedings that the application had instead been refused, no routines apparently existed for bringing records in the diary system up to date and into line with the actual outcome of oral proceedings. These records were set up to be modified only upon receipt of the written decision.

3. For the above reasons, the board finds that the representative of the appellant applicant in the present case did not take "all due care required by the circumstances" within the meaning of Article 122(1) EPC.

The request for *restitutio in integrum* under Article 122 EPC is therefore refused. Hence the appeal has to be rejected as inadmissible.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

Registrar:

Chair:

S. Sánchez Chiquero

R. G. O'Connell