



Case Number: D 0013/04

D E C I S I O N
of the Disciplinary Board of Appeal
of 31 January 2005

Appellant: N.N.

Representative: N.N.

Decision under appeal: Decision of the Examination Secretariat dated
8 September 2004.

Composition of the Board:

Chairman: B. Schachenmann
Members: R. Menapace
K. Büchel

Summary of Facts and Submissions

- I. On 29 July 2004 the Appellant's employer on her behalf filed by facsimile the application for enrolment for the European qualifying examination ("EQE") 2005 together with the required further documents and a debit order for the basic fee. The closure date for the application was 30 July 2004.
- II. On 20 August 2004, while the Appellant was on maternity leave, an e-mail was sent to her on behalf of the EQE Secretariat, by which she was informed, that "the master copy, which needs to be sent to the Examination Secretariat as well, is still outstanding".
- III. By letter dated 8 September 2004 the Appellant was informed of the decision of the Head of the Examination Secretariat to refuse the Appellant's application for enrolment for the EQE in 2005 for the reason that no written confirmation copy had been received within a period of one month of the faxed application, see [Announcement of the EQE 2005] OJ EPO 3/2004, p. 119-120).
- IV. On 7 October 2004 an appeal was filed against said decision and the appeal fee was paid by means of a debit order. In support of the request to set aside the decision and to accept the Appellant's enrolment it was submitted, that all other requirements for the Appellant's enrolment having been fulfilled, the confirmation copy would not have added information to what was timely made available to the Examination Secretariat, and that the ensuing delay of the

Appellant's professional career is out of proportion with the error made, in which she had no part in.

V. At a date not appearing in the EQE file, but later than within one month after the facsimile filing of the enrolment application and the accompanying documents, the corresponding original documents were received by the EQE Secretariat.

VI. Annexed to his letter dated 20 January 2005 the President of the EPO made comments pursuant to Article 27(4) of the Regulation on the EQE ("REE") and Article 12 of the Regulation on discipline for professional representatives, in which it was submitted, that Rule 24 EPC is not applicable and it is clearly set out in the Announcement of the EQE 2005, that the written confirmation must be supplied within a non-extendable period of one month. The Examination Secretariat has no legal obligation to remind the candidates of that time limit. The reminder sent to the Appellant via e-mail was a courtesy service performed by the Secretariat and, although no time limit was set therein, it was not misleading, since the candidate is expected to know about the Announcement. Moreover, the written confirmation is meant to ensure that the information received is correct, especially that the candidate does possess the required academic knowledge, and therefore original copies are requested.

Reasons for the decision

1. Facsimile filing is since long recognized in the proceedings under the EPC, national authorities and even judicial bodies as an efficient, reliable and valid alternative to the time-consuming and often less reliable delivery of documents by post. In line with this, facsimile filing is also available in respect of the application for enrolment for the EQE 2005 - see point I.4 of the "Announcement of the European Qualifying Examination 2005" (OJ EPO 2004, 119).

2. According to the conditions governing facsimile filing of patent applications and other documents as laid down by the President of the EPO based on Rule 24(1) and 36(5) EPC in the relatively few cases, where a confirmation is still prescribed, it has to be supplied at the invitation of the Receiving Section/the EPO; the legal sanction for non-compliance with said invitation and its legal basis are expressly indicated: refusal of the Application under Article 91(3) EPC or, respectively, that the facsimile shall be deemed not to have been received, as provided in Rule 36(5) EPC (see Article 4 of the Decision of the President of the EPO dated 26 May 1992, OJ EPO 1992,299). It is the evident purpose of this regime to preserve as much as possible the advantages of facsimile filing and, at the same time, to the extent as the requirement to file a written confirmation in the conventional way is upheld, to diminish as far as possible the risk of loss of rights for non-compliance with that formal requirement.

3. The REE adopted by the Administrative Council of the EPO (OJ EPO 1994, 7 with later amendments) as well as the implementing provisions thereto drawn up by the Examination Board under Article 7(6) of the Regulation being silent on the way in which applications for the enrolment for examination have to be "addressed to the Secretariat" (Article 21(1) REE), the admission of facsimile filing and its conditions is a matter of discretion by the department responsible for arranging the yearly EQE, i.e. the Secretariat. This discretionary power has to be exercised in a reasonable manner, i.e. oriented towards the objective purpose and in consideration of general legal principles.

4. The relevant sentence in point I.4 of the Announcement of the EQE 2005 (point 1, above) reads: "Where an application for enrolment is filed by **facsimile**, written confirmation reproducing the contents of the facsimile documents must be supplied within a non-extendable period of one month." Contrary to facsimile filings under the EPC (pt. 2 above), an invitation to file the required confirmation copy is not mentioned, with the effect - at least, as it appears to be the understanding of the Secretariat - that no such formal invitation is issued to the candidate and the one-month time limit has to be calculated from the date of the facsimile filing of the enrolment request. Moreover, the text is silent on what would be the legal consequence, if the confirmation copy is not received by the Secretariat within said time limit.

5. Under these circumstances the apparent practice of the Secretariat to issue an e-mail warning sent to the candidate's personal mailbox, is not an effective

compensation for the greater risk which candidates are exposed to under the regime as set out in the preceding point, neither in law (not mandatory, no effect on the calculation of the time limit for filing the confirmation copy), nor in fact, as the present case demonstrates: it was sent to the candidate, who was absent from her working place, and not to her employer which had actually made the facsimile filing on her behalf. Furthermore, at the end of the enrolment form provided by the EPO (EPAForm 51014.3), just above the space for the candidate's signature, the following information is given: "Receipt of your application for enrolment will be acknowledged by e-mail. Candidates who have not received an acknowledgment **by 31 December 2004** [emphasis added] should contact the Examination Secretariat". From this a candidate may reasonably understand that she/he has nothing to check as regards the receipt of the documents in question before the indicated date.

6. Special circumstances which would justify stricter conditions for facsimile filings with the EQE Secretariat than with the rest of the EPO with the effect that candidates were exposed to a higher risk of a loss of rights than it is the case when other documents are filed with the EPO by facsimile, are not at all evident. Nor did the decision under appeal invoke such circumstances; rather, the sole ground given for the refusal was the fact, that no confirmation copy had been received within the one-month period. It is true, that pursuant to Article 7 of the Decision of the Examination Board of 19 May 1994 (OJ EPO 1994, 599) the enrolment form shall be accompanied by a certified copy of the degree or of the

diploma. However, this constitutes a distinct requirement of its own, which is neither factually nor legally linked to the facsimile filing of the application for enrolment; it must be - and is by no means automatically - fulfilled also where the application is filed directly (and solely) by post. It is pointed out that neither in Article 7 cited above, nor elsewhere, legal consequences for non-compliance with this requirement are provided for and the Announcement of the EQE 2005 does not refer to this requirement, in that it merely prescribes a "written confirmation reproducing the contents of the facsimile documents".

7. Neither the decision under appeal, nor the Announcement mentioned any legal basis for a refusal, the latter not constituting such a basis already for the mere ground, that it is silent on the legal consequences of not filing a confirmation copy.

8. Given this, the impugned refusal of the application for enrolment for the EQE 2005 is flawed both for inappropriate exercise of discretionary power and for lack of legal basis. For that reason and in view of the Secretariat's role and resulting duties also in respect of candidates, reimbursement in full of the fee for appeal is equitable in the circumstances of the present case (Article 24(4) REE).

Order

For these reasons it is decided that:

1. The decision under appeal is set aside
2. The Appellant's application for enrolment is considered to have been validly filed.
3. Re-imbusement of the fee for appeal is ordered.

The Registrar:

The Chairman:

P. Martorana

B. Schachenmann