



Case Number: D 0006/12

D E C I S I O N
of the Disciplinary Board of Appeal
of 17 July 2013

Appellant: N.N.

Decision under appeal: Decision of the Examination Board for the
European Qualifying Examination dated 27 July
2012.

Composition of the Board:

Chairman: B. Günzel
Members: C. Rennie-Smith
H. G. Hallybone

Summary of Facts and Submissions

I. The appellant, who was an unsuccessful candidate in all the papers of the European Qualifying Examination ("EQE") held in 2012, appealed against the decision of the Examination Board of 27 July 2012 as regards papers A and B for which she was awarded 40 and 48 marks respectively. In her combined notice and statement of grounds of appeal dated 27 August 2012 and received on 30 August 2012 she requested that the decision be set aside as regards papers A and B. She also requested:

- *"revision of the marks awarded to appellant for papers A and B with [a] respective increase of appellant's marks for the mentioned papers that will correspond to appellant's answers given to papers A and B"; and*

- *that "appellant be allowed to look into a detailed marking of appellant's papers A and B....which would allow appellant to establish a one-to-one correspondence between the marks awarded/deduced [sic - presumably "deducted"] and corresponding parts of appellant's answers".*

The appellant also requested reimbursement of the appeal fee paid on 31 August 2012 and oral proceedings.

In a letter dated 22 October 2012, the appellant was informed that the Examination Board had decided not to rectify its decision and that the appeal had been remitted to the Disciplinary Board of Appeal ("the Board").

II. By letters from the Board of 30 October 2012, the President of the European Patent Office and the President of the Institute of Professional Representatives were invited, pursuant to Article 24(4) REE and 12 RDR, to comment on the case. Neither President replied.

III. The appellant presented separate arguments in relation to each of paper A and paper B, both based on her assertion that the examiners used incorrect model solutions to mark her papers, and a further argument, applying to both papers A and B, that they were not marked separately by two examiners. Her arguments can be summarised as follows:

1. IPREE provides rules as to the specific claims which are to be written in a specific way, for paper A claims offering the broadest possible protection in accordance with the EPC (Article 23(3) IPREE) and for paper B claims amended as appropriate to meet the requirements of the EPC (Article 24(3) IPREE). The Examiners' Report provides model solutions and explains how marks are reduced if candidates deviate from the model solutions. The model solutions for papers A and B were incorrect, so in the appellant's case her answers were compared with incorrect solutions. In her appeal she sought to have her answers compared with the correct solutions.

Paper A

2. Paper A required candidates to draft claims relating to a device for measuring the temperature

of a liquid in which the device floated. Several embodiments of the device were described and candidates had to draft an independent claim embracing them all. The description of one embodiment (paragraph [14] and Figure 5 in the instruction letter forming part of the question paper) showed a stabilising weight inside that embodiment of the device, while a more general passage (paragraph [24] in the same letter) stated that the shape of the body of the device could be chosen so that no stabilising weight is needed.

3. The Examiners' Report stated, first (Examiners' Report Paper A 2012, page 7, para. 2.3.2), that 20 marks were deducted for the inclusion in an otherwise correct claim of any one of several features, one of which was "a stabilising weight" since this would exclude the arrangement described in paragraph [24] and, second (*ibid*, page 13, para. 2.6.3, last example), that 5 marks were deducted for including *inter alia* a feature of "stabilising means" because it would not be clear if that arrangement was excluded or not.
4. The appellant did not include the limiting features "a stabilising weight" or "stabilising means". Her independent claim described the device as "provided with a stabilising part allowing the floating body to adopt a first predetermined orientation", and her dependent claims 11 and 12 included respectively "wherein the stabilising part is a weight placed inside of the hollow body" and "wherein the stabilising part is a special shape of the floating body". This had made it

unambiguously clear to the examiners that she was aware that the stabilising effect could be achieved by the shape of the device, that her independent claim 1 only included a "stabilising part" which was not a limitation and still covered all the embodiments of the invention including the arrangement of paragraph [24]. However, the appellant's independent claim incurred a major mark reduction for inclusion of a feature, namely "stabilising weight" or "stabilising means", which she did not include and therefore her answer was not marked consistently in violation of Article 6(2)(c) REE.

5. The omission of that same feature from the independent claim would be contrary to Articles 83 and 84 EPC since the independent claim would then omit an essential feature. This infringed Rule 23(3) IPREE, second sentence.

6. The marking sheet did not show the marks awarded for her independent claim so she could not relate the marks awarded to her answer and thus did not have "details regarding the marking pertaining to her answer paper" as required by Rule 4 IPREE. So to obtain that information she requested that she be allowed to look into the detailed marking of her answers to papers A and B (though as regards paper B she provided no supporting argument). She did not maintain this request at the oral proceedings.

Paper B

7. Paper B required candidates to draft amended claims relating to a self-cooling barrel for beverages employing a zeolite/water adsorption process, the beverage container being inside a zeolite layer in turn contained within an outer wall. The amended independent claim had to be novel and inventive over the prior art, not to extend beyond the application as filed, to be clear and, within those limits, as broad as possible. The Examiners' Report showed (Examiners' Report Paper B 2012, pages 4 to 5, section 2) that the examiners considered that the correct claim should include the feature that the "second wall" (of the beverage container) comprises a bottom wall of the container due to paragraph [13] and Figure 3 of the patent application forming part of the question paper and omission of that feature lead to the loss of 10 points.

8. The appellant argued that such a bottom wall could not be derived directly and unambiguously from paragraph [13] or Figure 3. There was no mention in the description of a bottom wall so she thought the shape of the container was not important. The Guidelines for Examination (F.IV-11.4.3) say that, if there is no reason to believe a feature is essential, an applicant may retain an unamended claim and amend the description if necessary. With that in mind, the appellant decided a bottom wall was not important at all. Claim 4 in the question paper showed that a bottom wall could be

introduced later than in the independent claim. When asked by the board at the oral proceedings to identify a serious mistake on the part of the examiners, the appellant stated that this had cost her 10 points.

9. The Examiners' Report also stated (*ibid*, page 13, para. 4.5.2, example A) that a reduction was made if candidates did not include the feature that the adsorption chamber (the zeolite layer between the beverage containing chamber and the outside of the barrel) was U-shaped and insulated the inner chamber from the environment. In view of the differences between the application and the prior art, this contradicted the Guidelines for Examination (the appellant cited C.IV-11.5.2 of the Guidelines but there is no such section).

10. The appellant's marks for paper B were reduced substantially for reasons which contradict Article 84 EPC since there was no support in the description for the bottom wall feature; and contradicted case law since it was not possible to single out that feature from Figure 3 (T 191/93) and since an independent claim must specify all the essential features of an invention (T 133/85) which did not include the bottom wall; and contradicted the Guidelines which did not require the introduction in the claim of the U-shaped and insulating adsorption chamber feature. Therefore the reduction in the appellant's marks infringed Rule 24(3) IPREE, second sentence and Article 13(1)(a) REE.

Paper A and B

11. The appellant argued that her papers were not marked by two members of the Examination Committee separately as required by Article 8(1)(e) REE. Her two marks for paper B differed only by one and for paper A were identical. This contradicts the law of probability according to which no two markers would award such similar or identical marks even if applying the same rules or instructions for marking. As a matter of probability this could only happen in the case of 2 candidates out of 500 or not at all. Asked by the Board at the oral proceedings what she thought actually happened, the appellant submitted that the papers were marked by one examiner whose marks were then copied by the other. Asked if, having heard the description of the marking process supplied by the President's representative (see section IV below), she still maintained her papers were not marked by two persons, she asserted she did and that the "suspicious" meeting of the Examination Committee provided an opportunity for one marker to copy the marks of the other. She accepted that the burden of proof was on her and said she had discharged it "up to the hilt".
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- IV. At the oral proceedings the Board asked the President's representative to explain the marking process and was informed that all papers are marked by two markers in accordance with a detailed scheme. The two markers, who are identified only by numbers, do not know each other's identity while carrying out their marking. All

the scripts for one paper are not sent to the same two markers. After each marker has marked all the scripts sent to him or her, there is a meeting of the Examination Committee where any major differences in marks are discussed and if appropriate the marks are adjusted. Separate marking sheets are completed to show the marks awarded by each of the two markers.

- V. A summons to oral proceedings on 28 June 2013 was issued on 28 February 2013. In an accompanying communication the Board notified the appellant of its provisional opinion that the appeal would apparently have to be dismissed. The preliminary opinion included an analysis of the appellant's case which indicated that her arguments showed only that she and the examiners had different opinions and that she had not shown, as required by the Board's jurisprudence, any mistakes which are serious and so obvious that they can be established without re-opening the entire marking procedure. In her reply of 16 April 2013 the appellant expressed her disagreement with the Board's view, stating that the examiners' opinions were in fact incorrect decisions to reduce her marks, that there was only a single correct answer to each of paper A and B but incorrect answers had been used to mark her papers. These mistakes were serious because awarding reduced marks for her correct answers meant she failed the papers, and the mistakes were identifiable from the Examiners' Reports, her marking sheets and the provisions of REE and IPREE so re-opening of the entire marking was not necessary. The appellant also requested postponement of the oral proceedings, to which the Board agreed. The oral proceedings were postponed to 17 July 2013.

VI. In a further letter of 27 May 2013, the appellant requested permission to use a computer-generated slideshow during the oral proceedings and stated this would contain only information already submitted and therefore only be a visual aid. In a second communication of 6 June 2013 the Board invited the appellant to file a copy of the slideshow at least two weeks before the oral proceedings but also observed that it sought not a further explanation of the information in her grounds of appeal but an explanation as to how her submissions showed one or more contraventions of the REE or its implementing regulations. In a letter dated 13 June 2013, the appellant requested an extension of time for filing the copy slideshow which, in a third communication of 18 June 2013, the Board refused and also reminded the appellant of the observation in its previous communication. The appellant filed a copy of her slideshow on 2 July 2013.

VII. Oral proceedings took place on 17 July 2013 attended by the appellant and a representative of the President of the EPO. The appellant's final requests at the conclusion of the oral proceedings were that:

- the decision of the Examination Board of 27 July 2012 be set aside as regards papers A and B;

- the appeal fee be reimbursed.

Reasons for the Decision

1. It is well established by the jurisprudence of the Disciplinary Board that it only has jurisdiction in EQE matters to establish whether or not the Examination Board has infringed the REE or a provision implementing the REE. This follows from Article 24(1) REE which is the basis of the Board's jurisdiction in EQE matters and which reads:

"An appeal shall lie from decisions of the Board and the Secretariat which adversely affect the appellant, but only on the grounds that this Regulation or any provision relating to its application has been infringed."

Thus the Board 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 Board 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 Board. Value judgments are not, in principle, subject to judicial review. (See, for example, D1/92 (OJ 1993, 357), Reasons points 3-5; D6/92 (OJ 1993, 361), Reasons, points 5-6; and D 7/05 (OJ 2007, 378), Reasons, point 20).

2. The appellant, whose arguments must be seen in the light of this principle, was clearly aware of it since she presented her arguments as alleged violations of the REE or of the Implementing Provisions to the REE ("IPREE"). However, it is apparent from the requests in the appellant's grounds of appeal for revision of her marks and inspection of the detailed marking of her papers (see section I above) that in truth what she sought was the substitution of higher marks than those awarded so that she would have passed the EQE in papers A and B. In attempting to reconcile that aim with the need to demonstrate a violation of the REE or IPREE, she gave certain of those provisions interpretations which they simply will not bear (see points 3, 5, 8 and 9 below).

3. Taking first the appellant's argument (see section III.4 above) that her answer to paper A was not marked consistently in violation of Article 6(2)(c) REE, the relevant part of that provision reads:

(2) Subject to the IPREE, the Examining Board shall give the members of the Examination Committees instructions for:

.....

(c) marking candidates' answers consistently.

Thus that Article concerns instructions to Examination Committees and not the actual marking of individual answers. The appellant produced no evidence whatsoever, indeed produced no argument whatsoever, that the Examination Board did not give members of the Examination Committee instructions for consistent marking. In the oral proceedings before the Board the

representative of the President confirmed, and the Board sees no reason to doubt, that detailed marking sheets were drawn up for both papers. The very purpose of such detailed marking sheets is to ensure consistent marking by the examiners. Accordingly, the appellant has shown no violation of that provision and her argument must fail for that reason alone.

4. None the less, the Board readily accepts that consistency of marking should be expected. However, the appellant has shown no inconsistency, let alone a serious and obvious mistake (see point 1 above). The appellant's arguments demonstrate only that the examiners deducted marks for her independent claim because (as stated in the Examiners' Report) they considered she had included the limiting "stabilising weight" feature when she asserts that she did not include it because she used the words "stabilising part" which was not limiting. The appellant's argument in this respect appears tenuous, since it seems perfectly possible that the examiners viewed "stabilising part" as no different, or insufficiently different from, "stabilising weight" and it is at least questionable whether "stabilising part" is not limiting as the appellant suggests. Hence, since it is quite clear that there is at least scope for a difference of opinion, there is no obvious mistake and the appellant has quite simply asserted her opinion against that of the examiners (see section III.1 above). That is a clear case of the Disciplinary Board being asked to review a value judgment on the merits of the candidate's answer which it is not permitted to do.

5. The appellant's next argument relating to paper A (see section III.5 above) is that the omission of that same stabilising feature from the independent claim would be contrary to Articles 83 and 84 EPC since the independent claim would then omit an essential feature and this would infringe Rule 23(3) IPREE, second sentence. The first two sentences of that Rule read:

(3) Candidates are expected to draft an independent claim (or claims) which offer(s) the patent applicant the broadest possible protection in accordance with the EPC. When drafting the claim(s), candidates shall bear in mind the requirements of the EPC, in particular regarding novelty and inventive step, and the recommendations contained in the Guidelines for Examination in the EPO.

It appears from the first passage from the Examiners' Report cited by the appellant (Examiners' Report Paper A 2012, page 7, para. 2.3.2) that the examiners considered that the broadest protection would be offered by an independent claim which omitted the stabilising feature and therefore that is what they expected of candidates. That the appellant thought otherwise is clear but, again, while the examiners' view seems perfectly possible, the Board does not need to decide which view is right. This is a further example of the appellant's opinion being used to challenge that of the examiners which, in the absence of a serious and obvious mistake, is no more than a request to the Board to conduct an impermissible review of a value judgment.

6. As regards the appellant's request to look into the detailed marking of her paper A (see section III.6 above) because her marking sheet did not show the marks awarded for her independent claim and did not allow her to verify for which answers she lost points, the Board observes that the marking sheet shows she was given 30 points for her independent claim and the appellant's own grounds of appeal clearly show that she indeed knew, from those marking sheets in conjunction with the detailed Examiner's Report, for which aspects of her answer she lost points. Thus Rule 4 IPREE was not infringed. As regards paper B the appellant made the same request but without any supporting argument. Since the appellant did not maintain this request at the oral proceedings, no more need be said of this argument.

7. As regards paper B the appellant argued that her marks were reduced substantially for reasons which contradict provisions of the EPC, or case law, or the Guidelines for Examination in the EPO and that this infringed Rule 24(3) IPREE, second sentence and Article 13(1) (a) REE (see section III.10 above).

8. Rule 24(3) IPREE reads:

(3) Candidates are expected to respond to all points raised in the official communication. The response shall be in the form of a letter to the EPO accompanied by the claims supplied by the client, amended as appropriate to meet the requirements of the EPC. The description shall not, however, be amended. In their reply, candidates shall identify clearly all amendments made in the claims and their basis in the application as filed, and provide additional explanations where

necessary. Candidates shall also set out their arguments in support of the patentability of the independent claim(s).

The second sentence of Rule 24(3) IPREE requires that candidates shall amend claims with which they are supplied so as to meet the requirements of the EPC.

Article 13(1)(a) REE reads:

The examination shall establish whether a candidate has:

(1) a thorough knowledge of:

(a) European patent law as laid down in the EPC and any legislation relating to Community patents...

This Article simply sets out the purpose of the examination, namely to establish whether a candidate knows the law.

9. It does not follow from those provisions that, if the candidate and the examiners hold different opinions on the application of the law to the case in the question paper, the candidate's answer paper has been wrongly marked.

10. As with her arguments relating to paper A, the appellant has in respect of paper B done no more than request the Board to review a value judgment which the Board is unable to do. The opinion of a particular candidate such as the appellant as to what are the requirements of the EPC and how the claims should be amended in the light of those requirements may clearly differ from the opinions of the examiners, not least

when the candidate has received his or her results and reads the summary of the examiners' opinion in the Examiners' Report.

11. Thus to take for example the issue of the "bottom wall" feature, the examiners considered it must be in the amended independent claim in the light of paragraph [13] and Figure 3, whereas the appellant considers there is no support for the feature in the description so its inclusion offends Article 84 EPC. The words of the appellant's own argument - she **thought** the shape of the container was not important; she **decided** a bottom wall was not important - serve only to illustrate that what she claims to be the correct answer is no more than her own view of the correct answer. In the absence of a serious and obvious mistake the Board need not decide between those views, and it certainly cannot accept, as the appellant argues, that her view is correct, elevate it to the status of the single correct answer, and then overrule the examiners.

12. The appellant's final argument, applying to both papers A and B, is that her papers were not marked by two members of the Examination Committee separately as required by Article 8(1)(e) REE (see section III above, under "Papers A and B"). The Disciplinary Board cannot accept the appellant's contention. It is based on an application of probability theory which appears to be inherently incorrect since it is not applied to random variables differing only by chance but to the substantially defined situation of a body of examiners marking answer papers in accordance with instructions (issued under Article 6(2)(c) REE). Further, the

- appellant accepted that her probability assessment would not necessarily eliminate the actual result.
13. When asked by the Board at the oral proceedings what she thought actually happened, she answered that one marker actually marked the paper and the other copied his marks. After hearing an account of the actual marking system, which provides for two markers to mark each paper independently, she not only maintained her allegation that one examiner copied the other's marks but suggested that the examiners meeting, which she called "suspicious", provided the opportunity for the copying to take place. When the board observed that she was in effect alleging forgery and a conspiracy to falsify the examination results which would call for a high burden of proof, she submitted she had proved her case "up to the hilt". However, the Board considers that the appellant has made no more than a number of groundless allegations and not shown even a hint of any mistake, let alone a serious and obvious mistake. It is simply not possible to conclude from the appellant's arguments, whether based on probability theory or conspiracy theory, that two separate markers did not mark her papers when all the available evidence shows that in fact they did.
14. Despite the presentation of the appellant's arguments as alleged violations of REE or IPREE, it seems clear that this appeal only discloses differences of opinion between the appellant and the examiners. The Board made this clear in the analysis of the appellant's case which it provided in the preliminary opinion in its first communication of 28 February 2013 and, in both its subsequent communications of 6 and 18 June 2013, it

reminded the appellant that she needed to explain how her submissions showed one or more contraventions of the REE or its implementing regulations. However, she did not do this in either her reply to the first communication or her slideshow presentation or her submissions at the oral proceedings. Both in her reply to the Board's preliminary opinion and at the oral proceedings the appellant submitted that the seriousness lay in the fact that she had lost marks but, beyond maintaining her opinion that her answers were correct and the examiners assessments were wrong, she did not indicate any mistakes. Accordingly, the Disciplinary Board has no alternative but to dismiss the appeal.

Order

For these reasons it is decided that:

The appeal is dismissed.

The Registrar:

The Chairman:

G. Rauh

B. Günzel