



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 0037/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 21 February 2022

Appellant: N.N.

Decision under appeal: Decision of the Examination Board dated 21 June 2021 concerning the Paper B part of the European Qualifying Examination 2021

Composition of the Board:

Chairman: W. Sekretaruk

Members: T. Bokor

S. Colombo

Summary of Facts and Submissions

- I. The appeal is against the decision of the Examination Board posted on 21 June 2021 to award the appellant's answer paper the grade FAIL to her Paper B part of the examination of the European qualifying examination 2021 (hereinafter "Paper B 2021") in accordance with Rule 6(3)(b) of the Implementing provisions to the Regulation on the European qualifying examination (IPREE, OJ EPO 2019, Supplementary publication 2, 18) because her answer paper had been awarded 41 marks.

- II. The decision of the Examination Board, as set out in the letter of the Examination Secretariat dated 21 June 2021 contained the usual grouping of the appellant's individual marks as foreseen in the Examiner's Report, for all four examination papers A to D. The decision also contained a statement concerning the neutralisation of a part of the paper D and the consequential awarding of 25 marks for the affected part. The group of the marks awarded for the her paper B did not appear to include any marks awarded for some special reason, nor was there any other reference in the decision to any further compensation marks, beyond those mentioned for the Paper D.

- III. By telefax and letter dated 29 July 2021, received on 29 July 2021 and 2 August 2021 in the EPO, the appellant filed a notice of appeal including a statement setting out the grounds for appeal. The appeal fee was paid on 27 July 2021.

- IV. The appellant contested the marking of her paper, to the extent that the Examination Board failed to take into account systematic failures of the Wiseflow

software used, and the resulting time loss that the candidate had to suffer (in more detail below).

- V. The Examination Secretariat remitted the appeal to the Disciplinary Board of Appeal on 10 August 2021, stating that the Examination Board had decided not to rectify its decision. On the same day the Examination Secretariat also informed the appellant that her appeal was not allowed by the Examination Board, *"after having taken due consideration of all arguments brought forward"* in the appeal. The Secretariat also provided the following information to the appellant: *"Please note that the facts you described in your email of 4 March 2021 have been taken into consideration by the Examination Board before issuing the impugned decision. In particular, the Examination Board came to the conclusion that it would not have been possible to correct satisfactorily the major issue of added subject-matter within the last 15 minutes of the examination"*.
- VI. With letter dated 4 October 2021 the appellant referred to the above letter of the Examination Secretariat and gave further arguments why the Examination Board made a serious and obvious mistake in the marking of her answer paper.
- VII. The President of the Council of the EPO and the President of the European Patent Office (EPO) were given the opportunity to comment pursuant to Article 12 of the Regulation on discipline for professional representatives (RDR, OJ EPO 2022, Supplementary publication 1, 147), in conjunction with Article 24(4) of the Regulation on the European qualifying examination for professional representatives (REE, OJ

EPO 2019, Supplementary publication 2, 2). No comments were received.

VIII. In her appeal the appellant argued in essence that a systematic failure of the Wiseflow software was not properly taken into account for the following reasons.

The appellant candidate lost time during the examination because the lockdown browser window of Wiseflow suddenly and unexpectedly closed, while the appellant was still working on her answer paper. When this happened, she made the prescribed steps and contacted the invigilator for a new password. Having received it, she logged in and continued working on the answer paper. The incident understandably caused her significant stress, beyond the effective time loss. After the examination she also reported the incident as foreseen. To her knowledge, such incidents affected other candidates as well, so that the incident must have been caused by a systematic failure. This was also demonstrated by the compensation provided in the Paper D. However, there was no trace in her marking that the incident was taken into account in any way, nor did she receive any such indication separately. Not taking the incident into account and not giving her any compensation for the time loss is a serious and obvious failure of the Examination Board.

IX. In her submissions of 4 October 2021 the appellant argued that the observations of the Examination Board (see point V above) did not take into account the arguments put forward in the appeal, and demonstrated that the Examination Board did not follow the marking scheme as foreseen by the Examiner's Report. The latter did not provide for an automatic FAIL grade if an answer paper retained claims with added subject-matter.

Nor were any additional deductions foreseen for the arguments on novelty, inventive step and third-party observations in such a case. It was apparent from her answer paper, in particular from her high scores, that she would have achieved more marks on these issues if she had not lost time.

- X. The appellant requested that the decision under appeal be set aside and that the matter be referred back to the Examination Board for a new decision on her answer paper B. From her submissions it is apparent that she requests that her paper should be re-marked and the new decision should be based on this re-marking. She also requested oral proceedings and the reimbursement of the appeal fee.

Reasons for the Decision

1. The appeal is admissible.
2. The decision can be taken in written proceedings. The appellant requested oral proceedings on an auxiliary basis, i.e. in the event that her request for remittal for a re-marking was not granted. As her request can be granted for the reasons given below, it was not necessary to hold oral proceedings.
3. The appellant requested that the contested decision be set aside. She alleged obvious and serious errors in the marking of her answer paper and errors in the conduct of the examination.
4. In accordance with Article 24(1) REE and the consistent case law of the Disciplinary Board of Appeal (hereinafter "the DBA"), which followed decision D 1/92 (OJ EPO 1993, 357), decisions of the Examination Board

may in principle only be reviewed for the purposes of establishing that they do not infringe the REE, the provisions relating to its application, or higher-ranking law. It is not the function of the DBA to reconsider the entire examination procedure on the merits. This is because the Examination Committees and the Examination Board have some latitude in their evaluation which is subject to only limited judicial review by the DBA. Only if the appellant can show that the contested decision is based on serious and obvious mistakes can the DBA take this into account. The alleged mistake must be so obvious that it can be established without reopening the entire marking procedure.

5. The Board holds that the core objection raised in the appeal relates to the marking of her paper only formally. The underlying issue is one of principle, namely whether and to what extent an individual candidate can be compensated for unexpected events during the examination, where such an unexpected event cannot be imputed to the affected candidate but clearly causes a disadvantage for the candidate. Such a disadvantage may affect several candidates, if not necessarily all of the candidates of any given examination session. It is also conceivable that only one person is affected.

6. It is settled case law of the DBA that equal treatment of candidates is an issue which may be the subject of appeals under Article 24(1) REE (see the recent decision D 0008/21, point 10.2 of the Reasons and the cases cited). The principle of equal treatment requires that candidates should take part in the examination under equal conditions. Thus it follows from this principle of equal treatment that unequal conditions

which may cause unjustified disadvantages for candidates should be compensated, to the extent feasible.

7. In the present case, the appellant candidate set out plausibly that the closing of the lockdown browser window was unexpected and that the interruption of the examination in this manner cannot be imputed to her. The Board has no reason to doubt that she followed the instructions of the Examination Secretariat and took the expected steps in the given situation. The appeal itself does not quantify the effective time loss, but the Board finds it plausible that the time loss caused by the incident was not insignificant. The Board also accepts that even if the actually measurable time loss between the closing of the window and the subsequent successful logging in of the candidate may not have been excessively long, the additional stress effectively prevented her from concentrating on the paper to the same extent as before.
8. Beside her appeal, the appellant also relies on her further submissions, in particular the information available from the letter of the Secretariat dated 10 August 2021 mentioned in point V. above. The Board sees no reason for not taking these submissions into account (Article 114(2) EPC in conjunction with Article 25(1) RDR). The statement of the Examination Board is relevant for the case and the appellant could not have submitted it with the appeal.

Failure to apply the marking scheme

9. The appellant argues that the Examination Board did not apply the marking scheme as foreseen in the Examiner's Report, as derivable from the mentioned "major issue of

added subject-matter". The Board is unable to subscribe to this conclusion. The Examination Board merely stated that "*it would not have been possible to correct satisfactorily the major issue of added subject-matter within the last 15 minutes of the examination*". There is no statement whatsoever from which it could be derived that the Examination Board awarded a FAIL grade directly because of some added subject-matter, quite irrespective of the total number of the marks awarded, or that the appellant's arguments on other issues would have been additionally penalised because of the added subject-matter.

Interpretation of the Examination Board's statement

10. On the face of it, this statement can be read in several ways. The wording of the whole statement and its context appears to suggest first and foremost that it was recognised that the candidate has lost some time, and at least 15 minutes at the end of the examination was affected by the incident. It is in fact left open if these 15 minutes is accepted to be the effective time loss, or merely that the incident happened about 15 minutes before the end, so that in the last 15 minutes the candidate could not be expected to work properly on her paper. The context suggests that the Examination Board was inclined to consider these 15 minutes as a realistic measure of the time loss, given that it speculated about the possible actions of the candidate during this time, and assessed if her actions during this time might have decisively changed the result of her paper.

11. However, it is far less clear whether the incident was compensated in any way or not. The most straightforward interpretation is that no compensation was made, i.e.

the incident may have been taken into account, but it was deemed too insignificant for justifying some form of compensation, or rather that a possible compensation was considered, but it was deemed to be insufficient to offset the deductions made for the "major issue of added subject-matter". As pointed out in point II above, the usual listing of the marks awarded by the two markers mentions no compensation. This fact also appears to confirm this interpretation.

12. Alternatively, the Examination Board's statement can also be read to mean that some compensation was actually made, but in the end it was still insufficient to compensate for the loss of marks on the added subject-matter issue. This interpretation appears less plausible on the basis of the wording "*it would not have been possible to correct*" (emphasis by the Board). The use of the conditional conveys the impression that the appellant was not given the chance to correct whatever had to be corrected, whether by means of additional marks or otherwise.

Arguments in the appeal ignored by the Examination Board

13. The appellant also argued that the Examination Board did not take her arguments into account, contrary to the statement of the Secretariat. The Board cannot agree to this conclusion. In the reading of the Board, the statement of the Examination Board and the statements of the Secretariat at most may appear to leave this open, given that the appeal grounds are not discussed. The cited statement only concerns the circumstances of the impugned decision, and those considerations of the Examination Board obviously could not have taken into account the arguments in the appeal. On the other hand, the Secretariat positively

stated that the Examination Board had taken "*due consideration of all arguments brought forward in [the] appeal*", and the Board has no reason to believe that this was not the case.

14. The Board points out that pursuant to Article 24(3) REE the Examination Board or the Examination Secretariat shall remit the appeal to the DBA if it does not rectify its decision. Otherwise Article 24(3) REE leaves it open whether the remitting body is expected - or on the contrary, not entitled at all - to provide comments on the appeal in this situation. On one hand, such comments can be useful, in particular in view of the fact that the decisions of the Examination Board on the grades and marks awarded pursuant to Rule 6 IPREE normally do not contain any tangible reasons, apart from the known listing of the marks for the parts of the given paper. From a practical point of view there may be good arguments for requiring or expecting reasons from the Secretariat or the Examination Board when an appeal is remitted pursuant to Article 24(3) REE. On the other hand, if the Examination Board or the Secretariat were expected to treat such remittals analogously to the provisions of Article 109(2) EPC, they would be precluded from providing comments on the appeal and implicitly also on the underlying issues. Decision D 0004/18 held, in the context of a decision of the Secretariat on the registration of a candidate to the EQE, that the Secretariat exceeded its powers under Article 24(3), first sentence, REE because it effectively issued a new decision when it commented on the appeal and referred to new facts (points 7-8 of the Reasons). Decision D 0008/19 similarly held that the Examination Board exceeded its powers when it effectively issued a new decision by providing comments on the requests of the appellant (points 9-12 of the

Reasons). It also held that on remittal the Examination Board must refer the case to the Disciplinary Board of Appeal, as a rule without giving reasons (point 13 of the Reasons). However, D 0008/19 concerned a decision of the Examination Board where it remitted the case to the DBA without rectifying its decision, but at the same time stating - to the appellant - that the auxiliary request could have been allowable. To that extent the present case is not fully comparable to that underlying D 0008/19.

15. To the knowledge of the Board, the Examination Board occasionally, if not regularly, provides comments on the marking, as also in the present case. The Board also notes that the comments of the Examination Board were not included in the letter remitting the case to the Board, and in this manner the comments were formally not directed at the Board, but only at the appellant. In the present case it would be also far-fetched to qualify the comments as a new decision, irrespective of the addressee of the comments. Thus the Board sees no serious error in the fact that the Examination Board provided some information to the appellant, even if this information may be seen as forming part of the impugned decision.

16. The Board need not decide within what limits such comments can be made. For the present case it is sufficient to establish that the Examination Board or the Secretariat had no formal obligation under Article 24(3) REE to make any comments on the appeal. For this reason alone, the Board cannot see any serious and obvious mistake in the fact that the appeal arguments were left uncommented. From this it follows that it cannot be concluded from the missing comments that the arguments of the appellant were ignored.

17. This being the case, the Board must proceed on the basis of the scant information that is available to it. As explained above, the short statement of the Examination Board rather conveys the interpretation that it did not give any compensation to the appellant for the incident. On the other hand, the Examination Board appeared to accept that the candidate did suffer at least 15 minutes time loss.

18. Thus on the basis of the more probable interpretation and the facts derivable from the case, the Board must establish that the candidate suffered an effective time loss that could not be imputed to her, but was rather caused by the circumstances of the examination being held online. The Board considers that this caused unjustified disadvantage to her which would have deserved compensation in some form, but it cannot be established that such a compensation did take place. To that extent the examination and the marking of her papers were tainted with a serious error. For this reason the decision on the grade awarded to her Paper B must be set aside.

Request that the answer paper be re-marked by the Examination Board

19. The Board holds that the case must be remitted for new marking by the Examination Board, taking into account the incident (in the same vein D 0008/21, point 10.4 of the Reasons, in the context of unequal treatment of candidates writing Paper B in French vs. English or German). This was also the request of the appellant. Remitting the case back for determining the possible compensation permits the Examination Board to apply similar principles for similar situations. While the

Board has no direct knowledge of other cases directly comparable to the case before the Board, the appellant submitted that she had knowledge of candidates who were confronted with similar incidents.

20. The appellant provided extensive arguments why her Paper B should inevitably be awarded more marks, at least sufficient for her paper to be awarded the grade COMPENSABLE FAIL. She stated that the lost time would have permitted her to provide more arguments on inventive step and the third-party observations, and it is apparent from the marking scheme that such issues could have attracted the necessary marks.
21. The Board cannot comment on these arguments individually, already for the reasons given above in point 19 above. These arguments can be taken into account by the Examination Board, if it deems fit. However, in the opinion of the Board, the appellant cannot expect to be awarded marks on the basis of hypothetical solutions, even if her arguments explaining the amount of the potentially lost marks may appear perfectly plausible. It also appears very difficult, if not impossible, to quantify the effects of the stress caused by the incident. While it is reasonable to expect that the compensation should be tailored to the individual disadvantage that the candidate suffered, it still needs to be determined in an objective manner.
22. The Board recognises that it may not be possible to achieve a perfectly equitable compensation, or it may be very difficult to determine objectively the measure of an equitable compensation, but this does not justify not providing any compensation at all, where some compensation can be reasonably expected. An approximate

compensation is still more equitable than no compensation.

23. In the present case, the awarding of additional marks on the basis of the estimated time loss would seem as one possibility. As mentioned above, it appears that the Examination Board itself tried to quantify the time loss. The question remains if and how the estimated time loss can be compensated. A possibility that lends itself is the awarding of marks proportional to the time loss suffered. In this case, the compensation marks can be calculated, for example, by taking the ratio of the total marks achieved by the candidate during the useful time (i.e. the total time minus the time loss) and the useful time of the examination, and multiplying it with the estimated time loss. Alternatively, in a more generous approach, the ratio of the potentially achievable maximum amount of marks and the total examination time can be taken, multiplied with the estimated time loss. The example of the Paper D 2021 appears to suggest that a generous approach to compensatory marks is not alien to the Examination Board. On this basis, assuming the stated 15 minutes to be the effective time loss out of the total examination time of 210 minutes, the candidate could be possibly awarded 3 or 7 compensational marks based on the 41 marks achieved or the 100 marks achievable: $((41 / (210 - 15)) * 15) \approx 3$ marks or $(100 / 210 * 15) \approx 7$ marks). Taking the average of these would also appear to be sufficient for the appellant to be awarded a COMPENSABLE FAIL grade.
24. The Board emphasises that the above example should by no means be taken as the one and only acceptable method for establishing an equitable compensation. The examples only serve to demonstrate that a more or less

objectively determined compensation may well be decisive for the appellant, contrary to the apparent presumptions of the Examination Board. Thus the Board is satisfied that the appellant has a reasonable expectation of success, and the remittal for re-marking is not a mere formality.

25. Therefore, the Board decides to remit the case to the Examination Board with the order to determine the applicable compensation of the candidate in respect of the incident reported during the Paper B examination, and to undertake a new marking of the appellant's Paper B of the European qualifying examination 2021 under its powers pursuant to Article 6(5), last sentence, REE and to award a grade to the appellant on the basis of the re-marking.

26. The re-evaluation should take into account the incident reported by the appellant, and the results of the marking should indicate clearly how this had been taken into account. To the extent possible, any compensation should be based on objectively determined facts and parameters. This does not exclude that less exact conditions are also taken into account, such as the stressfulness of the situation following the incident. For example, the 15 minutes mentioned in the letter of the Secretariat can also be reviewed, if it is established that it does not represent correctly the effective time loss, contrary to the hypothetical assumptions of the Board, as set out in point 23 above.

Reimbursement of the appeal fee

27. The appellant requested reimbursement of the appeal fee. If the Board of Appeal allows the appeal, it

orders reimbursement in full or in part of the appeal fee if this is equitable in the circumstances of the case (Article 24(4), third sentence, REE). Given that the present appeal is successful, a full reimbursement of the appeal fee is equitable. Therefore, the appeal fee is to be reimbursed in full.

Order

For these reasons it is decided that:

1. The decision under appeal is set aside.
2. The case is remitted to the Examination Board with the following order:
 - a, the Examination Board is instructed to determine the applicable compensation of the candidate in respect of the reported irregularity during the Paper B examination and
 - b, the Examination Board is instructed to perform a re-marking of the appellant's answer paper for the Paper B of the European qualifying examination 2021 taking into account the determined compensation and
 - c, to award a grade to the answer paper under Rule 6(3) IPREE accordingly.
3. The appeal fee is to be reimbursed in full.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated