



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
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Case Number: D 0039/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 28 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 his 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 his answer paper had been awarded 36 marks.
- II. By fax and letter dated 21 July 2021, received on 21 July 2021 and 26 July 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 22 July 2021.
- III. The appellant contested the marking of his paper and raised several complaints in this respect.
- IV. 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.
- V. The President of the Council of the epi 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.

VI. In his appeal the appellant argued in essence that the marking of his answer paper was wrong for the following reasons.

a, The Examiner's Report was in error to penalise the "housefly eggs" amendment. The disclosure in the application of the Paper B permitted this amendment. Case law made it clear that the whole content of the application contributes to the disclosure. This was a serious and obvious mistake.

b, The marking was unfair because multiple deductions were effected for the same error. This was against earlier practice and also against the case law of the Disciplinary Board of Appeal, in particular decisions D 0013/17 and D 0016/17. Candidates could expect that the approach of earlier papers will be continued, in that double penalty for repeated errors will not be applied. Against this earlier practice, the "housefly eggs" amendment was penalized twice, in that a deduction was made for both Claim 1 and Claim 5. The deductions were different for the very same amendment, without any apparent reason for this difference. What more, there was even triple penalisation, given that the corresponding amendment arguments were also penalised with deductions for the very same error. The unfair marking was further aggravated by the fact that correct solution elements by the candidate remained unrewarded. He made expected amendments, for which he received no marks, due to the fact that one single wrong amendment, such as the "housefly eggs", caused 0 marks being awarded to claim 5 and the corresponding amendment arguments. This was not only unfair double penalty, but went against the fit-to-practice principle. An analysis of the marking of his answer

paper demonstrates that he had lost a significant number of marks in this manner. The marking also violated the principles of fair marking because the deductions could surpass the available marks.

c, His other solution elements were also erroneously marked in that the fit-to-practice criterion was not observed. His solutions may not have corresponded to the expected solutions of the Examiner's Report, nevertheless they were defensible solutions and as such deserved the award of a higher number of marks. The adding of the water container was justified. His claim 1 was novel and inventive when properly applying the problem-solution approach.

- VII. The appellant requested that the decision under appeal be set aside and that his answer paper be awarded a PASS or at least a COMPENSABLE FAIL grade. He also requested oral proceedings and the reimbursement of the appeal fee.
- VIII. The Board informed the appellant in a communication dated 18 February 2022 that the Board was minded to allow the appeal and to remit for re-marking on the basis of the arguments as set out in points VI(b) above, but the other arguments as set out in points VI(a) and VI(c) above were unlikely to succeed. These would appear to require a complete re-examination of the Paper B and as such would appear to be beyond the competence of the Disciplinary Board of Appeal.
- IX. With telefax dated 18 February 2022 the appellant stated that he consented to the withdrawal of those arguments that were identified by the Board as apparently not allowable, and requested remittal of the case without the holding of oral proceedings.

- X. For the details of the examination paper in dispute, reference is made to the published examination paper and the corresponding Examiner's Report, available on the website of the European Patent Office at [https://documents.epo.org/projects/babylon/eponot.nsf/0/3003815DE4A96079C125868E00487577/\\$File/B_2021_en.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/3003815DE4A96079C125868E00487577/$File/B_2021_en.pdf) and [https://documents.epo.org/projects/babylon/eponot.nsf/0/7043D0BB750F0825C12586F8002C8336/\\$FILE/Compendium_ExRep_2021_B_EN.pdf](https://documents.epo.org/projects/babylon/eponot.nsf/0/7043D0BB750F0825C12586F8002C8336/$FILE/Compendium_ExRep_2021_B_EN.pdf) at the time of writing.

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 his request for the awarding of a PASS or a COMPENSABLE FAIL grade was not granted. With his letter dated 18 February he consented to the remittal of the case for a full re-marking also without the holding of oral proceedings, if the Board were to decide as indicated in its preliminary opinion. As his request for remittal 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. He alleged unfair marking of his answer paper.
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. This is for instance the case if an examiner is found to have based his evaluation on a technically or legally incorrect premise upon which the contested decision rests (D 2/14). Another example of an obvious mistake would be a question whose wording is ambiguous or incomprehensible (D 13/02). All other claims to the effect that the papers have been marked incorrectly are not the responsibility of the DBA. Value judgments are not, in principle, subject to judicial review (see e.g. D 1/92, *supra*, points 3 to 5 of the Reasons)

5. On the other hand, in exceptional cases the DBA recognised that unfair marking may constitute an obvious and serious mistake. Decisions D 0016/17 and D 0013/17 made it clear that double penalisation (Doppelbestrafung), namely where a false response may have an effect on other parts of the examination paper and thereby may lead to a further loss of marks for the same error, cannot be considered to fulfil the requirements for a fair marking as developed in the case law (point 3.7.1 of the Reasons in both decisions, concerning the marking of Paper A). These decisions also held that excessive, i.e. unreasonably high

deductions for certain errors may also be considered to constitute unfair marking (Reasons 3.4, last paragraph in both decisions, in the context of potential deductions that could surpass the maximum possible marks). The Board observes that these latter objections were taken into account by the present marking scheme, given that the various parts of the paper could not be marked with less than 0 marks, irrespective of the total possible deductions applicable for the relevant part. These principles were further developed by decision D 0011/19, which held that separate deductions for erroneous claim amendments and additionally for the corresponding arguments by a candidate in support of such erroneous amendments do not necessarily mean an unfair double penalty. Under the circumstances such additional deductions may well be justified, given that the expected arguments give the candidate an opportunity to review its own assessment concerning the admissibility of an amendment, for example for the purposes of Article 123(2) EPC (D 0011/19, points 7.2.1 of the Reasons, in the context of Paper B).

6. In the Paper B 2021, candidates were expected to prepare a claim set comprising three independent claims, namely a device claim directed at a waste composting container, a method claim directed at a method of producing a fertilizer from composted waste with the help of a composting container, and a further method claim in the form of a computer-implemented calculation method for use in a composting process. In all claims, earthworms were an essential feature. The original claims filed (Rule 24(2) IPREE) only mentioned worms, but the originally filed description stated that the terms worms and earthworms were used interchangeably, meaning earthworms. The cited state of the art made reference to waste composting with

housefly eggs, among other enhancing additives. The client's letter (Rule 24(2) IPREE) expressed the wish of the client to include housefly eggs (as an alternative to worms or earthworms) in the independent device claim and the independent method claim directed at the composting method. The client suggested to replace the term worms/earthworms with "earthworms (8) and/or housefly eggs (8a)".

7. According to the Examiner's Report, accepting these suggested amendments of the client - in the following the "housefly eggs" amendment - was an error. If a candidate kept these amendments, various deductions resulted. The potential deductions caused by the amendment could affect the marks for the claims and the amendment arguments as well (points 3 and 5.2 of the Examiner's report). All claims, except Claim 1 could lose all marks, and all marks for amendment arguments could be also be lost.
8. As a result, if a candidate erroneously assumed the admissibility of the housefly egg amendment - but otherwise kept the expected claim structure - , this could result in the loss of 26 marks for this error alone. Assuming that a candidate took up the housefly egg also in claim 6 could increase the potential loss up to 33 marks, and even up to 37 marks, looking apart from other potential deductions that could have been also caused by the insertion of the "housefly eggs" in the claims. For details of the calculation, reference is made to D 0022/21, point 6 of the Reasons. Assuming that the error only affected claims 1 and 5, i.e. assuming the seemingly most probable consequence if the error in the client's proposal was not recognised, the potential loss was 26 marks. The Board finds that the potential loss could be significant, if not excessive.

In view of this significant potential loss, the marking must be fair.

Arbitrary features of the marking scheme and double penalty

9. The Board must establish that the marking scheme contained features that appeared arbitrary and the Examiner's Report did not exclude the possibility of double penalty. The Board refers to decision D 0022/21, points 8 and 9 of the reasons, and explicitly concurs with the reasons given in support of these findings of the present Board.

Correct solution elements remain unrewarded

10. The appellant submitted that his paper contained several elements of the expected amendments that were foreseen by the Examiner's Report, and which did not attract any marks because of the total loss caused by the "housefly eggs" penalties. Specifically, he removed the lower compartment in claim 1, and his claim 5 corresponded very much to the expected solution, apart from the "housefly eggs" amendment. The Board considers that such a result is almost an inevitable consequence of a marking scheme where deductions can be made for various reasons. Candidates cannot expect that they will be awarded the full marks for certain partial solutions under any circumstances, even if these are doubtless correct on their own. According to Rule 24 IPREE, in the Paper B part of the EQE candidates are expected to respond to all points raised in the official communication and to provide amended claims that meet the requirements of the EPC, i.e. **all** requirements of the EPC. Thus answering Paper B cannot be reduced to the simple exercise of collecting marks for certain solution elements that are derivable from

the Examiner's Report. It is also required that the totality of the claims and the corresponding arguments constitute a complete and in itself consistent solution.

11. Still, the Board accepts that the particularity of the marking scheme that all marks for a claim and amendment arguments may be lost by a single error may be perceived as unfair. The deductions may be perceived as disproportionate, given that the marking scheme may not sufficiently distinguish between candidates. For this reason, the Board has doubts that the need for proportionality is properly observed in the present marking scheme. In this respect the Board refers to decision D 0022/21, points 11 and 12 of the reasons, and explicitly concurs with the reasons given in support of the above findings of the present Board.
12. In view of these details of the marking the Board cannot come to the conclusion that the marking of the "housefly eggs" amendment can be considered as fair in all respects. On the other hand, the Board also cannot establish beyond any doubt that the low number of marks awarded to the appellant indeed resulted from the unfair marking of the "housefly eggs" amendment, as argued by the appellant. As it is well known and also apparent from point 3 of the Examiner's Report for the Paper B 2021, deductions could be attributed to a number of factors, and not only for lack of support for the purposes of Article 123(2) EPC. Thus retroactively identifying the deductions effected in the appellant's answer paper specifically for the "housefly eggs" amendment would only be possible, if at all, if the Board scrutinized the totality of the Paper B (including the Examiner's Report) and the answer paper of the appellant, and effectively performed a complete

marking of his answer paper. As explained above in point 4, such an exercise is beyond the competence of the DBA.

13. The Board can establish directly from the appealed decision that the appellant obtained 5/5 marks for his independent claims by the respective markers, 2/2 marks for the dependent claims and 2/2 marks for his amendments arguments. A cursory review of his claims confirm that the argued correct solution elements are present in his answer paper. In view of these details the Board finds it plausible that the total marks awarded were decisively influenced by the marking of the "housefly eggs" amendment, without directly accepting the argued amount of the marks possibly lost due to the "housefly eggs" amendment. Given that a possible unfair marking could not be excluded by Board, the Board finds, giving the appellant the benefit of the doubt, that the appeal is well founded and allowable so that the contested decision is to be set aside according to Article 24(4), second sentence, REE. The Board holds that a new evaluation of the appellant's answer paper is justified.

Request for re-marking and award of grade

14. The appellant further requests that his answer paper be awarded a PASS or at least a COMPENSABLE FAIL grade. The Board follows the case law of the DBA (see e.g. decisions D 0024/17, point 15 of the Reasons, D 0013/17 and D 0016/17, point 4 of the Reasons) and considers that the Board itself cannot perform the re-marking requested. An assessment of the appellant's answer paper for determining the marks to be awarded would be equivalent to a review of the marking on the merits and thus would require value judgments which, according to

the established jurisprudence (following D 1/92, OJ EPO 1993, 357), falls outside the competence of the Board, as already stated above in points 4 and 12. This is not changed by the remaining very short time until the next Paper B examination. Therefore, the Board decides to remit the case to the Examination Board with the order to instruct the competent Examination Committee 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. However, this does not mean that the re-marking should necessarily achieve any given number of additional marks.

15. The re-evaluation should be based on a marking scheme which is fairly proportional and avoids multiple penalties, according to the principles as set out in decision D 0022/21, point 16 of the Reasons. These principles are also supported by the present Board.

Reimbursement of the appeal fee

16. 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 order to instruct the competent Examination Committee to perform a re-marking of the appellant's answer paper for the Paper B of the European qualifying examination 2021 and 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