ED0012.97-991470011

Decision of the Disciplinary Board of Appeal dated 25 June 1998

D 12/97

(Translation)

Composition of the board:

Chairman: W. Moser
Members: M. Lewenton
B. Schachenmann
L. C. de Bruijn
Ch. Kalonarou

Headword: Obligation to give reasons

Article: 125 EPC
Article: 8 of the Regulation on the European qualifying examination for professional representatives before the EPO (REE)
Rule: 68(2) EPC
Rule: 3, 9(2) of the implementing provisions (IP) to the REE

Keyword: "European qualifying examination - no duty to give reasons for decision - no proof that duty to give reasons is a principle generally recognised in the contracting states"

Headnote

I. The REE neither requires that European qualifying examination (EQE) decisions be reasoned nor refers to Rule 68(2) EPC, which therefore does not apply.

II. An obligation to substantiate such decisions, based on Article 125 EPC, presupposes establishing this to be a principle generally recognised in the EPC contracting states.

Summary of facts and submissions

I. The appellant sat the full EQE in March 1996. His grades for the four papers were as follows:

A: 4 - pass

B: 4 - pass

C: 4 - pass

D: 5 - inadequate

II. In a letter dated 1 October 1996 and posted the same day, the Examination Board informed the appellant that in accordance with its decision of 25 September 1996 he had not passed the examination. On 14 November 1996, the appellant filed notice of appeal against this decision, at the same time filing a statement of grounds and paying the fee for appeal.

III. The appellant's main argument is that the Examination Board's decision should have been reasoned. In the absence of any REE provision to that effect, Rule 68(2) EPC applied to Examination Board decisions also. Reasoned examination decisions were a fundamental basic right which had been acknowledged by the case law in Germany and had likewise to be observed in the European patent system. In addition, the Examination Board had infringed Rule 3, second paragraph, IP to the REE: separate marking, and the weightings - not apparent during the examination - given to different elements in Part II of Paper D, were at odds with the principle of uniformity of marking enshrined in that provision. Lastly, the Examination Board's

decision was invalid also because the persons marking his papers had clearly influenced each other, thereby infringing Article 8(b) REE.

IV. The appellant requested that

1) the Examination Board's decision dated 25 September 1996 be set aside, the matter remitted to the Examination Board for review and, in the event of an unfavourable decision, reasons provided in accordance with Rule 68(2) EPC;

2) the appeal fee be refunded.

V. The board gave the President of the European Patent Office (EPO) and the President of the Council of the Institute of Professional Representatives before the EPO (*epi*) the opportunity to comment. The representative of the President of the EPO explained in the oral proceedings how the marking system operated: each individual paper was marked by two persons who were each given their own marking sheet. Both then marked the papers separately, neither knowing the marks awarded by the other. Only afterwards did they exchange their results and if necessary try to agree on the grade.

Reasons for the decision

1. The appeal is admissible.

2. As the board pointed out in its communication of 16 April 1998, the REE and its IP are lex specialis for the EPC. In other words, unless they expressly refer to the EPC, then only they and not the EPC apply. But the REE **neither** requires that EQE decisions be reasoned nor refers to Rule 68(2) EPC, which therefore does not apply to them. Rule 9(2) IP stipulates merely that unsuccessful candidates be sent their answers and the marking sheets.

The only exception to the above principle in Disciplinary Board case law concerned "borderline cases" under the previous law. When the law was changed, these ceased to exist (D 8/96 [OJ EPO 1998, 302]), and the board's decisions on them can no longer be cited.

3. Also unfounded, in the board's view, are the appellant's constitutional arguments. In the oral proceedings he maintained that reasoned examination decisions were a fundamental procedural right in the EPC contracting states which also applied, via Article 125 EPC, to the EQE. This however overstates the case. A major element in any examination procedure is the examining bodies' discretion. Discretion is also essential in the marking process, and subject to only limited review by the courts; it is thus open to the legislator not to prescribe that examination decisions be reasoned, and to confine review to clear abuses of discretion in the marking procedure. The items sent to unsuccessful candidates under Rule 9(2) IP suffice for this purpose.

To support his view, the appellant cites in particular the legal position in the Federal Republic of Germany. The board would first point out that not even in that particular EPC contracting state is the alleged basic procedural right expressly enshrined in the law. True, the appellant has submitted a decision dated 9 December 1992 (Bay. VBl. 1993, 439) in which the Federal German Administrative Court, citing recent case law of the Federal German Constitutional Court, inferred from constitutional principles a general obligation to give written reasons for examination paper markings. However, not only is such national case law not binding on the board, but the court also refers to its earlier view, expressed in numerous judgments, that nothing in federal law requires regional legislators to stipulate that examination decisions be reasoned or the form they should take (loc. cit., page 441). So the principle that such decisions must be reasoned was not one accepted by the highest national court even in Germany, at least until very recently. The appellant's argument that the German legislator could not renounce this purported fundamental procedural right on accession to the EPC is therefore unsound. Nor has he shown this to be a principle generally recognised in the EPC contracting states (Article 125 EPC).

4. The appellant's objections to the way Paper D was marked are unfounded. As already explained in the communication referred to above, it cannot be the board's job to reopen the marking procedure and replace the markers' assessment with its own. For the markers to "weight" individual parts of a paper differently from the appellant lies within their discretion and does not breach either the REE or higher-ranking law.

5. Lastly, the appellant alleges that the markers contravened Article 8 REE by not marking the papers independently of each other. The representative of the President of the EPO has explained to the board's satisfaction how the marking procedure operates, and in particular the precautions taken to prevent one marker prematurely finding out the marks awarded by the other. Nothing in the present case suggests a departure from this procedure to the appellant's detriment.

6. The appeal must therefore be dismissed.

Order

For these reasons it is decided that:

The appeal is dismissed.