



Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

Boards of Appeal of the
European Patent Office
Richard-Reitzner-Allee 8
85540 Haar
GERMANY
Tel. +49 (0)89 2399-0
Fax +49 (0)89 2399-3014

Case Number: D 0036/21

D E C I S I O N
of the Disciplinary Board of Appeal
of 13 June 2022

Appellant: N.N.

Decision under appeal: Decision of the Examination Board dated
21 June 2021 concerning the European Qualifying
Examination 2021.

Composition of the Board:

Chairman: W. Sekretaruk
Members: G. Decker
S. Colombo

Summary of Facts and Submissions

- I. The appeal is against the Examination Board's decision posted on 21 June 2021 concerning the European qualifying examination 2021 (hereinafter "EQE 2021"). In this decision, the appellant was informed that his Paper A had been awarded a mark of 21 and his Paper D a mark of 49. On the basis of these marks, the Examination Board had decided that the requirements of Article 14(1) of the Regulation on the European qualifying examination for professional representatives ("REE", OJ EPO 2019, Supplementary publication 2, 2) in conjunction with Rule 6(3) of the Implementing provisions to the Regulation on the European qualifying examination ("IPREE", OJ EPO 2019, Supplementary publication 2, 18) had not been fulfilled and that the appellant had not passed the EQE 2021.

- II. By email dated 2 August 2021, 19:53 hrs, addressed to the Examination Secretariat's email address helpdesk@eqe.org, the appellant filed an appeal. It was contained in a pdf document which had been signed by the appellant and attached to the email. On the same day, the appellant paid the appeal fee.

- III. By email dated 3 August 2021, the Examination Secretariat (hereinafter "Secretariat") informed the appellant that filing an appeal by email was not admissible and that the appeal could be filed by fax in advance but that the original had to follow within ten days. In this context, the appellant was referred to Article 6(2) of the Additional Rules of Procedure of the Disciplinary Board of Appeal ("RPDBA", OJ EPO 2021, Supplementary publication 1, 67) and informed that the

Disciplinary Board of Appeal (hereinafter "Board") would establish whether or not the appellant's appeal had been filed in time.

- IV. The Secretariat received a fax on 3 August 2021 containing the appellant's appeal. By letter dated 3 August 2021, received by the Secretariat on 6 August 2021, the appellant sent the original appeal.
- V. In the statement of grounds of appeal, the appellant requested that the Examination Board's decision be set aside and that he be awarded a "PASS" grade for Paper A. He further requested re-assessment of the product and method claim of Paper A, reimbursement of the appeal fee and consideration of *"other circumstances that were beyond [his] control regarding possible compensation"*.
- VI. The Secretariat remitted the appeal to the Board, with notification that the Examination Board had decided not to rectify its decision.
- VII. 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 2021, Supplementary publication 1, 140) in conjunction with Article 24(4) REE. No written observations were received.
- VIII. In a communication under Article 14 RPDBA, the Board set out its preliminary opinion that the appellant had failed to file an appeal in the prescribed form within the relevant time limit under Article 24(2) REE and Article 6(1) and (2) RPDBA. Therefore, the appeal appeared to be inadmissible.

- IX. In a response dated 28 March 2022, the appellant provided arguments as to why his appeal should be considered admissible.
- X. Oral proceedings dealing exclusively with the question of the admissibility of the appeal took place on 13 June 2022. At the end of the oral proceedings, the Chair announced the Board's decision.
- XI. The appellant's arguments may be summarised as follows.
- (a) The REE, IPREE and the decision under appeal did not specify any information on how the appeal should be filed. Nor was there any information on the Secretariat's website concerning the means to use for filing an appeal with the Secretariat.
 - (b) There were no provisions stipulating that filing an appeal by email was not allowed. Rather, under Article 1(1) of the Decision of the President of the EPO concerning the electronic filing of documents (OJ EPO 2015, A91), documents in proceedings under the EPC may be filed with the EPO in electronic form.
 - (c) If filing an appeal by online fax was acceptable, then filing an appeal by email should be too, as both were electronic means of communication and technically suitable. From the sender's point of view, an online fax service worked in exactly the same way as a regular email service. In both cases, the document was exactly the same and was prepared in the same way, i.e. typed, printed, signed and scanned.

- (d) In decisions T 991/04 and T 756/08, the boards of appeal concluded that an electronically filed appeal was admissible. Filing an appeal by email complied with the requirements as laid down in Rules 1 and 2(1) and (2) EPC and in the Decision of the President of the EPO dated 9 May 2018 concerning the electronic filing of documents (OJ EPO 2018, A45).
- (e) It was not equal, fair and reasonable that, as per the Notice from the Examination Secretariat for the EQE (OJ EPO 2020, A140), the Secretariat was allowed to use email as a means of communication while a candidate - like the appellant - still had to use fax.
- (f) In Estonia, where the appellant resided, it was not possible to buy a fax machine, only expensive multifunctional devices. The only technical option the appellant had for filing the appeal was email.
- (g) Under Articles 1(1) and 3(3) of the Decision of the President of the EPO dated 13 May 2020 concerning the filing of documents during telephone consultations and during interviews and oral proceedings held by videoconference (OJ EPO 2020, A71), certain documents in appeal proceedings had to be filed by email.
- (h) In decisions T 991/04 and T 781/04, the boards applied the principle of good faith to conclude that the electronically filed appeals were admissible. To remedy the deficiencies in the case in hand, the Board should apply this principle.

Reasons for the Decision

1. *Admissibility of the appeal - formal requirements*
 - 1.1 Under Article 24(2), first sentence, REE, notice of appeal including the statement setting out the grounds for appeal must be filed in writing with the Secretariat within one month of the date of notification of the decision appealed against.
 - 1.2 In the case in hand, the decision under appeal was issued on 21 June 2021. Consequently, the one-month time limit for filing the written notice of appeal expired on Monday, 2 August 2021 (Article 24(4), first sentence, REE, in conjunction with Articles 21(2) and 24(1) RDR and Rules 126(2), 131(2) and (4), and 134(1), first sentence, EPC).
 - 1.3 Within the above time limit, the appellant filed a notice of appeal including the statement setting out the grounds for appeal by email only. It was not until a day later, i.e. on 3 August 2021, that the appellant re-filed the appeal by fax.
 - 1.4 On the issue of how the appeal should be filed, i.e. which means of communication were accepted for filing the appeal, the appellant contended that there were no provisions governing this issue. The Board does not agree for the following reasons.
 - 1.4.1 Article 24(2), first sentence, REE states that the appeal must be "*filed in writing*". When read in isolation, this provision indeed does not make it unambiguously clear that an appeal must be filed exclusively in paper form. It could be argued, for

example, that a fax or an email is also a "written" form, as opposed to oral communication.

1.4.2 However, to correctly interpret the term "*filed in writing*" under Article 24(2), first sentence, REE, this provision must be read in conjunction with the following provisions:

- Article 6(1), second sentence, RPDBA (applicable pursuant to Article 24(4), first sentence, REE in conjunction with Article 25 RDR), which sets out that the appeal "*shall be signed by the appellant*"
- Article 6(2) RPDBA, which stipulates that a "*notice of appeal and any written statement setting out the grounds of appeal may be filed by facsimile but a signed document reproducing the contents of every such notice and statement shall be filed within two weeks of the receipt of the facsimile*"

1.4.3 The latter requirement makes it clear that a fax alone does not suffice as a means of communication for filing an appeal. Rather, the REE together with the RPDBA clearly equates the filing of an appeal "*in writing*" with the filing of a paper document signed in original by the appellant, which must be received in that form by the Secretariat. Consequently, the standard means of communication for filing an appeal, constituting the rule, is an appeal document in paper form signed by the appellant; this document may be sent by postal services or delivered by hand to the Secretariat. Article 6(2) RPDBA provides for the sole exception to this rule, namely the option to file the appeal by fax in due time provided that the original is subsequently filed within two weeks.

1.5 Since the appellant filed an appeal solely by email within the time limit, he failed to meet the requirements as set out in Article 24(2), first sentence, REE in conjunction with Article 6 RPDBA.

2. *Admissibility of appeals filed by email?*

2.1 The appellant submitted various lines of reasoning as to why an appeal filed by email should nevertheless be considered admissible. In the Board's view, none of them is persuasive for the following reasons.

2.2 Appellants can derive the formal requirements for filing an appeal, including the accepted means for doing so, from the above-mentioned provisions on appeals against Examination Board decisions. Furthermore, there is no REE, IPREE, RDR or RPDBA provision requiring candidates to be given specific instructions on legal remedies. Hence, there was no obligation on the part of the Secretariat or the Examination Board to provide explicit information about the formal requirements for filing an appeal, contrary to what the appellant claimed. Though irrelevant to the present decision, the Board notes that in the decision under appeal there was an explicit reference to Article 24 REE "*with regard to appeals*".

2.3 Moreover, by asserting that there were no provisions *prohibiting* the filing of an appeal by email, the appellant concluded that this means of communication was admissible. The Board does not agree, and in fact the reverse is true: in view of the differing rule under Article 24(2), first sentence, REE, there must be express statutory provisions allowing this specific means of communication for filing an appeal if an appellant wants to make use of it. However, the regime

governing proceedings before the Board in EQE appeal cases does not contain any such provisions.

2.4 To support his conclusion that appeals could admissibly be filed by email, the appellant further referred to the following provisions.

- Under Rule 1 EPC, "*the requirement to use the written form shall be satisfied if the content of the documents can be reproduced in a legible form on paper*".
- Under Rule 2(1), first sentence, EPC, in proceedings before the EPO "*documents may be filed by delivery by hand, by postal services or by means of electronic communication*".
- Under Rule 2(2), first sentence EPC, where the EPC provides that a document must be signed, "*the authenticity of the document may be confirmed by handwritten signature or other appropriate means the use of which has been permitted by the President of the European Patent Office*".
- Under Article 1(1) of the "Decision of the President of the European Patent Office dated 10 November 2015 concerning the electronic filing of documents" (OJ EPO 2015, A91), "*[d]ocuments in proceedings under the EPC may be filed with the European Patent Office (EPO) in electronic form*".
- The "Decision of the President of the European Patent Office dated 9 May 2018 concerning the electronic filing of documents" (OJ EPO 2018, A45).

- Under Article 1(1) of the "Decision of the President of the European Patent Office dated 13 May 2020 concerning the filing of documents during telephone consultations and during interviews and oral proceedings held by videoconference" (OJ EPO 2020, A71), "*[d]uring telephone consultations and during interviews and oral proceedings held by videoconference, documents filed subsequently as referred to in Rule 50 EPC, including authorisations, must be filed by email*". Under Article 3(3), first sentence, of this Decision, in appeal proceedings "*documents must be sent to the email address indicated by the board of appeal*".

2.5 All of the above provisions concern proceedings before the EPO departments dealing with the grant and maintenance of European patents under the EPC. However, the proceedings in hand before the Board are dealing with an appeal against the Examination Board's decision on the appellant's EQE 2021 answer papers. As a rule, it is not the EPC that is applicable to these proceedings but the provisions laid down in the REE, the IPREE, part IV of the RDR (see Article 24(4), first sentence, REE) and the RPDBA. Provisions of the EPC are applicable in EQE appeal proceedings only if explicitly referred to, as is the case in Articles 13(2), 16, 21(2), 22(3), 24 and 25(1) RDR and in Articles 8(1), 9(1) and 17 RPDBA. None of the references in these articles concerns the provisions listed in point 2.4 above. It follows that none of these provisions may support the appellant's case. Incidentally, the Board notes that none of these provisions allows appeals to be filed by email.

2.6 The appellant further contended that since online fax and email were technically comparable and worked in the same way from the sender's point of view, both electronic means of communication should be accepted when filing an appeal. This contention is irrelevant given that there is no statutory provision allowing an appeal to be filed by email (see point 2.3 above).

2.7 In support of his case, the appellant cited decisions T 991/04 and T 765/08, which dealt with circumstances where an appeal was filed electronically, albeit via the "epoline®" online filing system, not by email. However, the boards in those cases applied EPC provisions and Decisions of the President of the EPO which are not applicable in the case in hand (see points 2.4 and 2.5 above). For that reason alone, the boards' findings in the cited cases are irrelevant here. Moreover, the appellant's contention that in the cited cases the boards had concluded that an electronically filed appeal was admissible is incorrect. Rather, the board in T 991/04 concluded (Reasons 24) that *"the notice of appeal does not comply with the formal requirement 'filed in writing' in Article 108 EPC"* while the board in T 765/08 concluded (Reasons 6) that *"the board does not see any possibility of examining the substantive merits of the appeal, as it is either nonexistent or at least not admissible"*.

2.8 Furthermore, the appellant referred to the "Notice from the Examination Secretariat for the EQE" (OJ EPO 2020, A140), which reads as follows:

"In accordance with Article 9(2) (b) of the Regulation on the European qualifying examination (REE), candidates are advised that with effect from

1 January 2021 all correspondence will be conducted in electronic form only, via the myEQE portal. This goes for all appealable decisions too. The requirement to use registered mail is removed. Appealable decisions will be deemed delivered ten days after being made available on myEQE. The time limits for appeal under Article 24 REE will apply mutatis mutandis."

In this context, the appellant claimed that it was not fair and reasonable that under this Notice the Secretariat was allowed to use email while he had to use fax for filing his appeal.

2.9 This Notice has no bearing on the question of admissibility of the appellant's appeal. Under Article 9(2)(b) REE cited in the Notice, the Notice serves solely the purpose of "*prepar[ing] and organis[ing] the examination*"; this includes appealable decisions from the Examination Board or the Secretariat which represent the last stage of the examination procedure. The Notice therefore has no impact on the subsequent stage, i.e. appeals against decisions of the Examination Board. In addition, the Secretariat has no power to abrogate the provisions governing the admissibility requirements under Article 24(2) REE in conjunction with Article 6 RPDBA. Moreover, within the above-mentioned ambit of the Notice, the appellant was indeed allowed to use email. As the appellant himself submitted, he used email when communicating with the Secretariat regarding problems that arose with the examination software when he sat one of the EQE 2021 papers.

2.10 Lastly, the appellant asserted that fax machines were not available in his country of residence, Estonia, and

that he could only buy expensive multifunctional devices; the sole technical option he thus had for filing the appeal was email. This claim is refuted by the fact that he filed the appeal by fax on 3 August 2022. Yet even if the appellant's assertion were true, it could not lead to the result whereby an appeal filed by email is admissible. The fact that an appellant may not have an opportunity to use a fax is within their own sphere of risk. More importantly, an appellant would always be in a position to readily use the primary means of filing an appeal, i.e. postal services.

3. *Principle of good faith*

3.1 In the email communication between the Secretariat and the appellant following his appeal by email, he pointed to the passages in the Notice reproduced in point 2.8 above, which stated that "*all correspondence will be conducted in electronic form only*" and that "*[t]he requirement to use registered mail is removed*". The appellant appears to have claimed that he had trusted that the information given in this Notice would also apply to appeal proceedings, thereby invoking the principle of good faith.

3.2 The principle of good faith is a basic principle generally recognised in EPC contracting states (see G 2/97, OJ EPO 1999, 123, Reasons 1). It can be understood as an embodiment of the right to fair procedure and a fair hearing under Article 6 of the European Convention on Human Rights and has to be taken into account by the EPO under Article 125 EPC. The latter provision in turn is applicable to EQE proceedings under Article 24(4), first sentence, REE in conjunction with Article 25(1) RDR. The principle of

good faith stipulates *inter alia* that the user must not be at a disadvantage as a result of having relied on erroneous information, e.g. in official statements of general applicability published by the EPO. Communications must be clear and unambiguous, i.e. drafted in such a way as to rule out misunderstandings on the part of a reasonable addressee (see J 3/87, OJ EPO 1989, 3, Headnotes 1 and 2).

- 3.3 The board does not agree that the information in the Secretariat's Notice was misleading. By explicitly referring to Article 9(2)(b) REE, the Secretariat made it clear that the Notice concerned (exclusively) the preparation and organisation of the examination (see point 2.9 above). Moreover, it becomes clear from the wording of the Notice ("*all correspondence will be conducted*" instead of "*must be conducted*"; "*this goes for all appealable decisions too*") that it concerned exclusively the Secretariat's correspondence. Lastly, it is clear that the removal of the requirement to use registered mail related (exclusively) to the "*appealable decisions*" mentioned in the immediately preceding sentence, especially since there is no requirement for candidates to use registered mail.
- 3.4 In a second line of reasoning, the appellant referred to decisions T 991/04 and T 781/04, in which the boards had applied the principle of good faith to conclude that the appeals filed electronically were admissible.
- 3.5 The principle of good faith also requires the EPO to warn a party of any loss of rights if the EPO could be expected to do so in good faith. As per G 2/97, OJ EPO 1999, 123, Reasons 4.1, two requirements must be met:

- The deficiency must be readily identifiable by the EPO within the framework of the normal handling of the case at the relevant stage of the proceedings.
- The user must be in a position to correct the deficiency within the time limit.

3.6 However, the facts underlying the cited decisions differ from the circumstances in the case in hand. In those decisions, the electronic filing took place well before the end of the appeal period, which is why the boards held that the appellants should have been warned about the formal deficiency. In the case in hand, the appellant filed the appeal by email on the very last day of the relevant period at 19:53 hrs. Consequently, the Secretariat had no opportunity to warn the appellant in time that an appeal by email was inadmissible. By the same token, the appellant was no longer in a position to correct the deficiency within the time limit. It follows that there is no scope for applying the principle of good faith here.

4. *Result*

Since the appellant failed to meet the requirements under Article 24(2), first sentence, REE in conjunction with Article 6 RPDBA by filing an appeal only by email within the relevant time limit, and since he may not rely on the principle of good faith, the appeal must be rejected as inadmissible.

Order

For these reasons it is decided that:

The appeal is rejected as inadmissible.

The Registrar:

The Chairman:



N. Michaleczek

W. Sekretaruk

Decision electronically authenticated