

**DETERMINATION OF SEA-FISHING BOAT LICENSING APPEAL
UNDER SECTION 16 OF THE FISHERIES (AMENDMENT) ACT 2003**

In relation to off-register capacity from fishing vessel MFV “Kay BB.”

Fiona McDonnell

Appellant

and

The Licensing Authority in Relation to Sea Fishing Boats

Respondent

Hearing: Written Appeal

Appeals Officer: Emile Daly B.L.

Date of Determination: 17 February 2023

Determination

Jurisdiction

This appeal is limited to jurisdiction granted to an Appeals Officer under section 6 (3) and (4) of the Fisheries (Amendment) Act 2003, which states:

Section 6 (3)

An Appeals Officer shall be independent in the exercise of his or her functions under this Act subject to—

(a) the law for the time being in force in relation to sea-fishing boat licensing, including, in particular, the legal obligations of the State arising under any law of an institution of the European Communities or other international agreement which is binding on the State, and

(b) such policy directives in relation to sea-fishing boat licensing as the Minister may give in writing from time to time.

Section 6 (4)

A policy directive given under subsection 3(b) may require certain prohibitions or conditions to be imposed in relation to sea-fishing for the purposes of protecting, conserving or allowing the sustainable exploitation of living marine aquatic species.

Policy Directive 2 of 2003 Fisheries Amendment Act 2003 states (at paragraph E) that capacity taken off the Fishing Register must be reintroduced onto the Sea Fishing Boat Register within two years of its removal from the fleet, otherwise the entitlement will be lost to its owner.

This appeal concerns, the loss of capacity under the two-year (“use it or lose it”) rule pursuant to Policy Directive 2/2003, under section 3 of the Fisheries Amendment Act 2003.

Capacity

On 6 July 2018 the Appellant removed capacity of 1.35 GT and 2.45 KW from the Fishing Boar Register, capacity that had attached to her fishing vessel MFV “Kay BB.” On this date it became “off-register” capacity. The Appellant’s plan was to complete improvement works to another vessel, MFV “Aith Bui” and transfer the off-register capacity onto the MFV “Aith Bui” to use to fish. But because the capacity was not reintroduced to the register on or before 6 July 2020, in accordance with Policy Directive 2/2003, the capacity expired.

Facts

On the 14 of December 2020 the Appellant wrote to the Respondents outlining that due to COVID-19 restrictions and the Appellant’s husband’s medical condition, they had been prevented from completing the works and complying with the regulatory requirements to licence the MFV “Aith Bui.”

The Respondent responded to this letter on the 5 January 2021, outlining that the two-year rule was mandatory and that the legislation precluded the Respondent from varying the requirements that off-register capacity be re-introduced to the register before the expiry of two years.

A sea fishing boat license application was received by the Respondent on 22 January 2021. In the application the Appellant proposed to use off-register capacity of 1.3 GT and 2.4 5KW from the MFV “Kay BB” as part replacement capacity for the MFV “Aith Bui.”

Following receipt of this application, the Respondent issued a letter of licence offer dated 2 February 2021, in which they advised the Appellant that her proposal to use the off-register capacity could not be accepted because it had expired on the 6 of July 2020.

The Appellant issued a notice of appeal on the 19th of March 2021.

Points of Appeal.

The Appellant submits the following points:

1. In order to prepare for the transfer of the off-register capacity to the MFV “Aith Bui”, work was required to be carried out on that vessel, to meet terms, that the licence offer would require.
2. By March 2020 the Appellant had engaged an independent contractor to carry out the work. However, on the 12th of March 2020, the country shut down due to the COVID-19 pandemic and the work could not be continued.
3. As the Appellant’s husband had a serious lung condition and his medical advisors placed him in a high category of risk from COVID-19, he was advised against exposure to any third parties. The vessel was stored at the Appellant’s home address and during the period March to July 2020, no one, not family members nor the contractor, was permitted to visit their property.
4. Also during this period, in accordance with government restrictions neither they nor the contractor were permitted legally to move outside a 2km and later a 5km radius of their homes.
5. As a result it was not possible to complete the works to the vessel before 6 July 2020. The four months that were lost was as a direct result of the pandemic and the government restrictions that were in place around that time.
6. Due to these highly unusual circumstances, the Respondent should have allowed a time freeze to apply to the two year time period (as freezes were applied to other time periods, eg in planning permissions, Car NCTs and animal testing deadlines) or alternatively advise them that the two years was not being frozen.
7. By treating the Appellant’s failure to meet the 2 years deadline, in a pandemic, when, had the four months not been lost, the Appellants would have completed the works and complied with the deadline is inherently unfair. Given the national lockdown and highly prescriptive travel restrictions that were imposed on everyone, it is unfair to apply the time limits if there had been no government restrictions in place.
8. The only way to preserve their capacity would have been to conduct a capacity swap, but that would have required the Appellant to identify a vessel and boat owner who was willing and able to facilitate a capacity swap, which

given the time constraints and travel restrictions, that was not feasible or practically possible.

9. No reasonable accommodation was made for the Appellant's husband's disability.

Defence to Appeal

10. Before the Covid 19 pandemic, when the Appellant advised the Respondent that they intended to use off-register capacity of the MVF "Kay BB" for the license application of the MFV "Aith Bui," the Respondent expressly advised the Appellant by letter dated 11 March 2019 that her off-register capacity needed to be reintroduced to the register by the 6 July 2020 as "*otherwise the entitlement would be lost.*" Furthermore, the Respondent expressly advised the Appellant that they would not issue any reminders in respect of the expiry of the off-register capacity.
11. The Respondent did not receive any contact from the Appellants until the 14 of December 2020, by which time the off-register capacity had expired over six months earlier. It was only at this point that they were advised of the Appellant's husband's medical condition.
12. By letter dated the 5 January 2021, the Respondent advised the Appellant that they had no discretion other than to apply the two year rule.
13. The Respondents offices were open and were fully operational during the pandemic and significantly from 12 March 2020 and 6 July 2020. The Appellant did not contact the Respondent during this time. And had the Appellant contacted the Respondent, potential options that were available to the Appellants with regard to bringing the capacity back onto the register could have been discussed with her e.g. a capacity swap – on and off register - which would have allowed a new two-year period to commence. But no such contact was made.
14. The Respondent sincerely regrets the position that the Appellant finds herself. However, the Respondent is bound by the statute and Policy Directive 2/2003 within which no discretion is permitted. As such it must be strictly applied.

Appeal Process

On receipt of this appeal, this Appeals Officer wrote to the Respondent, by email dated 30 June 2022, asking if a time freeze had been applied to the expiry times in applications had been caught between the operation of the two year rule and the Covid 19 restrictions. The Appeals Officer referred to other widely publicised time limit freezes that were applied by other public bodies in 2020 in respect of planning permission deadlines, PRTB deadlines and NCT deadlines.

The Respondents replied by email on 30 June 2022 indicating that that no time freeze had been applied in respect of the two year rule. They stated that their offices, being an essential service, were kept open and were staffed during the pandemic and that there was no restriction on the movement of persons who serviced or worked on boats during this time, because that was deemed to be essential work.

This Appeals Officer wrote to the Respondent on 30 June 2022 asking the Respondent to advise if the two year rule applied specifically in respect of individual appellants who were old or medically vulnerable, and who, in compliance with Government regulations, were not allowed to leave their home or travel outside 2 or 5 km and were not allowed to have persons attend their house, given that such appellants had no control over the time loss and that works to the vessel were required to allow the vessel to meet the licence conditions that would be imposed. I raised a concern that to apply the time limit as if no pandemic had occurred or as if no government restrictions were in place, might constitute indirect discrimination or a failure to make reasonable accommodation for disability under the Equal Status Acts. I suggested that the Respondent seek legal advice and requested that legal submissions be furnished.

Written Submissions

Respondent Submission

The Respondent's written submission was received by the Appeals Officer on 11 August 2022 and the Appellants reply was received on 26 September 2022. Essentially the defence of the Respondent was

- That the wording of the Policy Directive 2/2003 is non-discretionary and must be strictly applied.
- There is no legal basis to extend time for compliance with the Policy Directive two year rule and as no statutory instrument had been passed to freeze the operation of the time limit as other public bodies had, as such time runs as normal.

- The Appellants did not attempt to contact the Respondent from 12 March 2020 to 6 July 2020 when the off-register capacity elapsed and the Respondent were therefore unaware of the Appellant's husband's medical condition until after the capacity had expired.

Appellant Submission

The Appellant submitted in response

- The reason that the work had to be stopped on MFV "Aith Bui", which was mid-reconstruction, was because her husband had a rare genetic medical lung condition, which placed him in a high risk medical category and so no person – family or worker – could come near the house. It was simply not possible to complete the works on the boat on time, whether they had contacted the Respondent or not.
- The Appellant understands that in normal circumstances the operation of the Policy Directive 2/2003 two year time limit was strict, but the pandemic was not normal circumstances. Time-limits were extended by the State in other areas of life; planning permissions, NCT applications, CVERT applications, the requirement for animal testing and many other situations.
- The Appellant submitted that it was financially harsh enough on them that they were unable to fish during 2020 but then to lose their capacity to fish at all was additionally punitive.

Determination

As Appeals Officer, under the 2003 Fisheries Amendment Act, my powers are circumscribed. My jurisdiction is set out in Section 6 of the 2003 Act and my powers are subject to Ministerial policy directives, including Policy Directive 2/2003.

Paragraph E of Policy Directive 2/2003 provides a sea-fishing licence applicant with two years, from the removal of capacity from the fleet register, to reintroduce the off-register capacity to the register.

The central question in this appeal is - did the Appellant have the benefit of the full two year period and if she did not, was the loss of time within her control?

Having considered the Respondent's submission I accept that they were not made aware of the Appellant's husband's medical condition until December 2020 and I am

also satisfied that there is no basis for the Appellant to contend that there was a failure by the Respondent to make reasonable accommodation for his disability - in circumstances where they were not made aware of his disability until after the two years had elapsed. In this respect, I am with the Respondent.

However I am persuaded by the Appellant's submission that, but for the pandemic and the Government restrictions that were in place, she would have been able to comply with the two year rule and but for the restrictions, she was unable to comply. During the relevant time period, ie the last four months of the two year period, (from March to July 2020) she and her husband were prohibited by the Government from travelling. The restrictions were firstly limited to a 2 km radius from their home and thereafter a 5 km radius of their home and this pertained until June 2020, at which point the limit became 20km. The boat contractor, likewise was prohibited from travelling to their house where the vessel was being kept.

The Respondent's contention that the licensing of boats and fishing were an essential service and that the Appellant or the boat worker could have travelled wherever they needed to and the work could have been completed, fails to take account of the fact that no one was permitted to either come or go from this house during this period, under strict medical advice, because of the Appellant's husband had a rare lung condition. The Appellant produced a letter (dated 25.11.20) from the Appellant's husband's GP certifying that as a result of his medical condition he was within a high risk cohort to Covid 19 infection. Furthermore the contractor would have been unable to do the work to the vessel without some interaction site/on the vessel with the Appellant or her husband, which was prohibited and was medically advised against. I am satisfied that the failure to have the boat work completed within the time frame, was as a result of a combination of Covid 19, a medical vulnerability and the fact that the mandatory government restrictions were complied with by the Appellant and her husband and the boat contractor.

I do not accept the Respondent's submission that, had the Appellant contacted them in March 2020, an alternative remedy would have been available to them, because a capacity swap could have been effected which would have restarted the two year rule. This fails to take account of the fact that the ameliorative action, a capacity swap, would have required the Appellant to identify a boat owner who had a vessel and who was willing and able to host this capacity on a temporary basis. Locating and inspecting another vessel, would have not been possible unless they breached the travel restrictions and or exposed themselves to a risk of infection. It also would have been practically difficult if not impossible to carry out a capacity swap, given the restrictions and the limited amount of time that was available. For this reason I am of the view that the Appellant's failure to contact the Respondent in March 2020, would not have made any difference.

It is my view that, due to the highly unusual circumstances that pertained from March to July 2020, given that the country was in lockdown and no travel was permitted and given the medical vulnerability of the Appellant's husband and the fact that the Appellant was his sole carer, the two years that the Appellant had under Policy Directive 2/2003, in effect, became one year and 8 months. I am satisfied that the loss of four months occurring, as it did, at the end of the two-year time window was significant in its timing. I am satisfied that the loss of time fell outside the control of the Appellant and that but for the Covid restrictions between March to July 2020, the works to the Appellant's vessel would have been completed and the vessel would have been prepared to receive the replacement capacity within the two year window.

I accept that the wording of paragraph E of Policy Directive 2/2003 is strictly worded and does not give the Respondent a discretion to apply any period other than two year from date of removal from the register. I accept the Respondent's contention that the capacity is a private asset, which is up to the owner alone to manage. I accept that the Respondent had warned the Appellant that they would not be reminded about the expiry date. I accept that the Appellant did not contact the Respondent before July 2020. However, applying the same interpretation to the wording of the Policy Directive as that has been applied in a limited number of these appeals and where the lost time is not of an Appellant's creation, it is my view that the Appellant did not make an error about the expiry date. She knew that she had two years to prepare the new vessel to receive the capacity but the last four months of that two year period were robbed by Covid 19 and the restrictions that were put in place, which lay outside her control, and but for which, she would have reintroduced the capacity back on register in time.

I come to this view because of the highly unusual circumstances that prevailed in the country from March to July 2020. I uphold this appeal. I find that the Appellant should have been afforded a full two years from the date of removal of the capacity from the register, and not a period less than that.

Applying section 16 (4) (a) (ii) of the 2003 Act I determine that the licence offer made to the Applicant should treat the expired capacity, as if same had not expired.

Emile Daly B.L.
17 February 2023