

**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 “Lady Jan”

Kieran Healy

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

Fishing capacity of 12kW from MFV Lady Jan was assigned to the Appellant on 22 November 2019. This capacity had been off-register from 28 June 2019 and was due to expire within two years i.e. on 28 June 2021. As the replacement capacity was not reintroduced to the register by the Appellant on or before 28 June 2021, the capacity expired on that date.

Facts

A Sea Fishing Boat License application in respect of MFV “Ronan Finbarr” was received by the Respondent from the Appellant on 6 July 2021. The Appellant proposed to use 12 kW of off-registered capacity from the MFV “Lady Jan” as part replacement capacity for this license.

The assignment of this 12 kW capacity from the third-party to the Appellant had taken place the previous 22 November 2019. Following notification of this assignment to the Respondent, they wrote to the Appellant on 5 December 2019, approving the assignment and advising him that the off-register capacity from the MFV “Lady Jan” must be reintroduced onto the fishing register by 28 June 2021. The approval letter also advised that the Respondent would not be issuing any reminders in respect of off-register capacity and its expiry date.

Following the Appellant’s license application on 6 July 2021 the Respondent issued a letter of license offer dated 8 July 2021 advising that the capacity from the MFV “Lady Jan” had expired on 28 June 2021, ie 9 days earlier. This letter also referred to their letter of 5 December 2019 when this expiry date had been advised to the Appellant.

The Appellant issued a notice of appeal on 21 July 2021

Points of Appeal.

The Appellant submits the following points in this appeal:

1. When he read the expiry date in the Respondent's letter of 5 December 2019, he mistakenly read it as being 28 July 2021 and not 28 June 2021.
2. To evidence this, he provided phone records to show that he made attempts to phone the Respondent's office on 14 June 2021, 15 June 2021 and 21 June 2021 but the phone calls were not answered because this was during the Covid 19 pandemic restrictions.
3. Had he got through to the Respondent's office on any of these occasions he would have been advised that his capacity was due to expire imminently and he could have taken evasive action, eg by way of a capacity swap. However because he was unable to get through and because he had made a mistake on the dates, he was unaware that he needed to take evasive action.

Defence to Appeal

1. An mistake with respect to an expiry date is not a basis upon which the terms of Policy Directive 2 of 2003 may be dis-applied.
2. The Respondent has no power to dis-apply the terms of the Policy Directive, which is unconditional in its wording. This Appeals Officer is likewise bound.
3. The Respondent advised the Appellant that the expiry date of the capacity would be the 28 June 2021 by letter dated 5 December 2019 and they also expressly warned him that they would not issue him with any reminders with respect to the off-register capacity, so the Appellant cannot now assert that he was not on notice of the expiry date.
4. Off-register capacity is a private asset. It is a matter for the Appellant to manage.
5. There is no compelling basis to uphold this appeal.

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 allows a licence applicant two years from the removal of capacity from the fleet register, to reintroduce the off-register capacity to the register.

The Appellant in this matter has been candid. He explains the late application was because he misread the deadline as being 28 July and not 28 June 2021.

A consideration of the appeal decisions that are published on the DAFM website, show that there have been a number of previous appeals concerning similar mistakes and, in the absence of non-culpable time loss, none of these have been upheld.

The wording of the Policy Directive provides no discretion. It does not take account of explanations – that are reasonable or otherwise – as to why the capacity was not reintroduced to the register on time. Indeed there have been appeals where dates were missed due to tragic circumstances involving loss of life at sea, which the Respondent defended on grounds that the Policy Directive does not provide any discretion or variance, a defence which the Appeals Officer had no option other than to accept.

The only appeals which have been upheld is circumstances where the passing of time, within the two year time window, fell outside the control of an Appellant for example, where due to Government imposed travel restrictions during the Covid 19 pandemic, licence conditions could not be met or where the Respondent or another State body was the cause of a delay in surveying a vessel, and where this prevented the Appellant from complying with the terms of the licence offer. The rationale of these determinations is that because an appellant was not allowed the full two years he/she should not have to suffer the consequences of that time loss, if he/she was not the author of it. It is even arguable, given the strict wording of the Policy Directive, whether an Appeals Officers has the vires in respect of these determinations. However in a limited number of these appeals different Appeals Officers have drawn a distinction between those appeals in which the Appellant expected to have two years but lost some of that time and the loss was not of their making and those appeals where the loss of time was culpable, albeit understandable.

In this appeal, no non-culpable time loss has been argued by the Appellant. He contends that had the phone been answered by the Respondent in mid-June 2021, his misreading of the expiry date would have been identified to him. But that presupposes that it was up to the Respondent to identify this. There is no dispute on

this, compliance with the expiry date was a matter for the Appellant to manage. The Respondent had advised him of this in their letter of 5 December 2019 and expressly informed him that they would not be reminding him of the expiry date. A mistake, as understandable as it might be, even given Covid and how perception of time became altered during lockdown, unfortunately did not create an obligation to contact the Appellant prior to the expiry date. Nor does it create a discretion to dis-apply the strict wording of Policy Directive 2/2003.

Regrettably, particularly as that the application was only nine days late, but on the basis that the statute and Policy Directive provide no discretion to me in these circumstances, I am obliged to find that this appeal does not succeed. I would like it to be otherwise.

Emile Daly B.L.
17 February 2023