

CSU 10/81

JGM1/IM

18/3.7.8.0 low notated

SOCIAL SECURITY ACTS 1975 TO 1980
CLAIM FOR UNEMPLOYMENT BENEFIT

DECISION OF THE SOCIAL SECURITY COMMISSIONER

Decision No. C.S.U.3/81

1. My decision is that unemployment benefit is payable to the claimant for 2 September 1980 and 9 September 1980.

2. The claimant who is a share fisherman is the master and part owner of the M.V. Euba, a 36 foot light trawler based at Campbeltown. Campbeltown is situated at the west end of Campbeltown Loch, a sea loch approximately 3 miles long whose entrance at the eastern end is guarded by the island of Davaar. On 2 September 1980 the claimant's vessel left its mooring at Campbeltown harbour in the early morning but returned within an hour, the claimant having ascertained at the mouth of the loch that a heavy sea swell made it impracticable for his boat to attempt to fish that day. He had a similar experience on 9 September 1980. He claimed unemployment benefit for both days. The claim was refused by the local insurance officer on the ground that the claimant's activities on the mornings of 2 and 9 September 1980 amounted to performing work as a share fisherman within the meaning of regulation 8(5) of the Social Security (Mariners' Benefits) Regulations 1975.

3. The claimant appealed to the local tribunal. The local tribunal accepted the claimant's argument that it was necessary on these days for him to sail to the open sea at the entrance to Campbeltown Loch before determining whether conditions were suitable for fishing. The local tribunal who considered that the regulation must be applied "sensibly" accepted that the claimant had not performed work as a share fisherman on these occasions and unanimously upheld the claimant's appeal. The insurance officer appealed to the Commissioner. An oral hearing was held before me at which the insurance officer was represented by Mr. MacKenzie and the claimant appeared on his own behalf. He was accompanied by his wife who is also part owner of the vessel and concerned in a similar claim.

4. It is common ground that the claimant is a share fisherman to whom the provisions of the aforesaid Mariners' Benefits Regulations apply. It is also clear that the claimant is a master of a boat of which he is part owner in terms of these Regulations. The Regulations impose

/ conditions

conditions additional to those in the general unemployment benefit legislation which must be satisfied by share fishermen in order to establish entitlement to unemployment benefit. Regulation 8(5) and (6) of the aforesaid regulations provides as follows:-

"8.--(1)

(5) It shall be an additional condition with respect to the receipt of unemployment benefit by a sea-going share fisherman in respect of any day, that it is a day on which he performs no work as a share fisherman and in respect of which he proves that he has not neglected to avail himself of a reasonable opportunity of employment as a fisherman.

(6) Where a sea-going share fisherman is master or a member of the crew of a fishing boat of which either the master or any member of the crew is the owner or part owner, he must, in addition to satisfying the additional condition contained in paragraph (5) above, also prove that there was no work on or in connection with that fishing boat available for him on that day for the reason -

(a) that on account of the state of the weather the fishing boat could not reasonably have put to sea with a view to fishing; or

(b) that the fishing boat was undergoing repairs or maintenance, not being repairs or maintenance to which paragraph (7) below relates; or

(c) that there was an absence of fish from any waters in which the fishing boat could reasonably be expected to operate; or

(d) that any other good cause necessitated abstention from fishing".

No question arises in this case as to the provisions of regulation 8(7) which contain a definition of certain work to be included as "work as a share fisherman".

5. For the insurance officer it was argued under reference to Decision R(U)9/52 and unreported Decision C.S.U. 71/51 that the claimant's activities on the days in question amounted to performing work as a share fisherman for the purposes of regulation 8(5). It was enough that the claimant left harbour equipped to fish and intended to fish if conditions were suitable. The claimant in reply explained (1) that it was well known at Campbeltown that on certain days it was impossible to judge the suitability of sea conditions without steaming to the entrance of the loch, (2) it was not reasonably practicable to try to ascertain the conditions by land from the headland or to await local weather forecasts or reports from boats already at sea; and (3) on some days conditions which were suitable for larger vessels would be unsuitable for the claimant's trawler. He submitted that for the purposes of the regulation the intention to fish was paramount. He had not formed that intention on the days in question. Steps were taken to ascertain if the conditions were suitable and to enable him, if necessary, to prove that he was unable to fish should not be held to amount to performing work as a share fisherman. To apply the rule to every vessel leaving the quay would have the side effects of a disincentive to sail and try to fish in marginal weather conditions and at the same time of an incentive to fish in unsuitable weather.

6. The claimant struck me as an honest and reliable witness. I am prepared to accept his evidence as to the local conditions at Campbeltown particularly as affecting his boat and as to his actions and intentions on the days in question. I consider that there is some force in his arguments. The relevance of the intention to fish however requires further consideration. In Decision R(U)9/52 two fishing boats on their way to fishing grounds ran aground blocking the harbour entrance and forcing a third to return. The crew of all three boats were held to have performed work as share fishermen on that occasion. In Decision R(U)9/53 the claimant's boat was forced to return home from fishing grounds by reason of the breakdown of a "neighbour" boat. The claimant in returning home, albeit prematurely, was held to be performing work as a share fisherman. In unreported case C.S.U. 35/51 the claimant who had sailed to fishing grounds only to find the weather impossible was held to have performed work as a share fisherman. In C.S.U. 71/51 a claimant who went out to fish but returned after half an hour as the weather had become unsuitable was held to have performed work as a share fisherman. In all these cases it could be said that the claimants or the masters of their boats had formed the intention to fish but that was not made the basis of the decision. In each case the decision appears, correctly in my view, to have rested on a conclusion drawn from all the facts that the claimants had performed work as share fishermen.

7. The present case is however unusual in that the claimant maintains that his action in steaming to the entrance of the loch was necessary in order to ascertain if weather conditions were suitable for fishing. Thus he raises an issue under regulation 8(6)(a) as well as 8(5). In a case where a claimant seeks to satisfy the further condition of regulation 8(6) that there was no work available for him on the day in question for the reason stated in subhead (a), i.e. that on account of the weather the fishing boat could not reasonably have put to sea with a view to fishing, the meaning to be applied to the expression "performs

no work as a share fisherman" for the purposes of regulation 8(5) must in my opinion be consistent with allowing the claimant to satisfy that further condition. It would follow that steps which were reasonably necessary to establish that on account of the weather a fishing boat could not reasonably put to sea with a view to fishing should not be held to amount to the performance of work as a share fisherman. Equally of course if the claimant's actings should amount to his having "put to sea with a view to fishing" he would be unable to satisfy regulation 8(6)(a) and would I think necessarily be regarded as having performed work as a share fisherman for the purposes of regulation 8(5).

8. I have come to the conclusion that the claimant should not be regarded as having performed work as a share fisherman on the days in question. In most cases a share fisherman on a boat which leaves the harbour equipped to fish will no doubt be held to have put to sea and to perform work as a share fisherman on that day even if the fishing is frustrated by bad weather or other causes. In the present case I am prepared to accept that because of the uncertain weather, the situation of Campbeltown and the size of the claimant's boat, it was necessary for the claimant on the days in question to steam to the entrance of Campbeltown Loch in order to ascertain whether the weather conditions at sea would permit him to fish. That did not in my opinion amount to his having "put to sea with a view to fishing". I also accept that on account of the state of the weather the claimant's fishing boat could not reasonably put to sea with a view to fishing, and that the claimant is able to satisfy the additional condition of regulation 8(6) upon ground (a). Since the only "work" which it is suggested in this case that the claimant performed as a share fisherman for the purposes of regulation 8(5) was the work of putting to sea with a view to fishing it is in my opinion logical that the claimant should not be regarded as having performed work as a share fisherman upon those days. This conclusion does not appear to me to conflict with the cases referred to above, which did not raise the issue of the satisfaction of the additional condition under what is now regulation 8(6)(a). In my opinion the local tribunal were justified in the conclusion which they reached in the present case.

9. The appeal of the insurance officer is not allowed.

(Signed) J.G. Mitchell
Commissioner
Date: 6 May 1981