ATLEU

ANTI TRAFFICKING AND
LABOUR EXPLOITATION UNIT

ATLEU 232 Hornsey Road
London N7 7LL

dx: 89203 HORNSEY
tel: 020 7700 7311
fax: 020 7700 4315
web: www.atleu.org.uk

Submissions to the Low Pay Commission in relation to the "family worker exemption" (National Minimum Wage Regulations 1999 (regulation 2(2))

We write to make representations in relation to the Low Pay Commission in relation to the current approach taken by courts and tribunals to the exemption from the national minimum wage contained in regulation 2(2) of the National Minimum Wage Regulations 1999.

The statutory framework

Section 1 of the National Minimum Wage Act 1998 ("the 1998 Act") provides:

"(1) A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.

(2) A person qualifies for the national minimum wage if he is an individual who—

(a) is a worker;
(b) is working, or ordinarily works, in the United Kingdom under his contract; and
(c) has ceased to be of compulsory school age.

(3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe."

Section 3 empowers the Secretary of State to exclude certain classes of person from the right to NMW. The power can be exercised in relation to persons who have not attained the age of 26 or to persons in limited specified categories.

Regulation 2(2) of the 1999 Regulations, made by the Secretary of State under the 1998 Act, provides:

"(2) In these Regulations 'work' does not include work (of whatever description) relating to the employer's family household done by a worker where the conditions in sub-paragraphs (a) or (b) are satisfied.

a) The conditions to be satisfied under this sub-paragraph are:
   i) that the worker resides in the family home of the employer for whom he works
   ii) that the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities;

iii) that the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals; and
iv) that, had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work because the conditions in sub-paragraph (b) would be satisfied.

b) The conditions to be satisfied under this sub-paragraph are

i) that the worker is a member of the employer's family,
ii) that the worker resides in the family home of the employer,
iii) that the worker shares in the tasks and activities of the family, and that the work is done in that context."

Background of the exemption

ATLEU understands that the family worker exemption was introduced following representations by au pairs' organisations, concerned that the national minimum wage would prevent the positive experience of au pairs working in families by imposing too great a financial burden on prospective host families.

The British Association of Au Pairs ("BAAP") says the following in relation to determining a) who is an au pair and b) whether they are entitled to the national minimum wage and other employment rights:[1]

> "Au pairs usually live with the family they work for, are unlikely to be classed as a worker or an employee and aren't entitled to the National Minimum Wage.
>
> They're treated as a member of the family they live with and get 'pocket money' instead - usually about £70 to £85 a week.
>
> Workers and employees have different rights, eg the right to the National Minimum Wage and paid holidays.
>
> Au pairs may have to pay Income Tax and National Insurance, depending on how much pocket money they get.
>
> An au pair isn't classed as a worker or an employee if most of the following apply:
>
> • they're a foreign national living with a family in the UK
> • they're an EU citizen or have entered the UK on a Youth Mobility Visa or student visa
> • they're here on a cultural exchange programme
> • they've got a signed letter of invitation from the host family that includes details of their stay, eg accommodation, living conditions, approximate working hours, free time, pocket money
> • they learn about British culture from the host family and share their own culture with them
> • they have their own private room in the house, provided free of charge
> • they eat their main meals with the host family, free of charge

[1] Taken from http://www.bapaa.org.uk/displaypage.asp?page=6

- they help with light housework and childcare for around 30 hours a week, including a couple of evenings babysitting
- they get reasonable pocket money
- they can attend English language classes at a local college in their spare time
- they're allowed time to study and can practise their English with the host family
- they sometimes go on holiday with the host family and help look after the children
- they can travel home to see their family during the year

Example

Gina has come to the UK from France to learn English. She lives with her host family and takes part in family events like days out and holidays. She has her meals with the family and does light housework and childcare for about 5 hours a day. She babysits a couple of times a week.

Gina has 2 free days every week. She studies English at a local college 2 afternoons a week. Last year she spent 3 weeks in France visiting her own family and also went on holiday with her host family.

Gina is neither a worker nor an employee. She gets £75 a week pocket money and doesn't pay tax or National Insurance.

The application of the exemption by employment tribunals

ATLEU lawyers have represented a very different class of worker for a number of years in relation to claims for the national minimum wage, both in their previous employment at North Kensington Law Centre, in association with Islington Law Centre and now operating as an independent organisation.

ATLEU lawyers have particular experience working with "overseas domestic workers" brought into the UK either on a domestic worker visa under Rule 159 of the Immigration Rules, or under the provisions of Tier 5 (International Agreement). ATLEU lawyers represent such workers to bring claims in the Employment Tribunal and County Court.

Overseas domestic workers are a focal point of concern internationally because of the vulnerability of their circumstances. We understand that Kalayaan have provided the Low Pay Commission with abuse statistics concerning those workers with whom they have had contact and that these statistics indicate a high level of abuse so we will not repeat that information here although we would direct the Low Pay Commission to the 1990 parliamentary debate discussing this issue (http://hansard.millbanksystems.com/lords/1990/nov/28/overseas-domestic-workers).

Over the course of the calendar year September 2011 – September 2012 ATLEU lawyers represented overseas domestic workers in a number of claims. Of these, 12 claims were settled or awards made by tribunals, amounting to a total value of approximately £210,000.

In each of these cases, the family worker exemption was invoked by the Respondents.

The impact of the family worker exemption being raised as part of a claim is as follows:

- it strengthens the employers' hand pre-litigation, during the preparation of the case and in hearing since it takes away the claimant's clear and unambiguous entitlement to the national minimum wage that other classes of worker enjoy

- it adds considerable time to the preparation of a case and therefore to the costs of any public funding of litigation

- the analysis and discrediting of evidence produced by respondents on the family worker exemption demands scrutiny and particular skill

- it renders success in a case uncertain since satisfaction of the exemption depends not on any objectively verifiable matter (for instance a minimum standard of accommodation, access to language classes, minimum hours of work etc) but, in the majority of cases, on the credibility of an oral account given in tribunal as to the precise nature of the treatment of the worker in the family context

- the particular, isolated nature of work in the private household places overseas domestic workers at a disadvantage in giving evidence of this kind since they are generally their only witness of fact; they regularly speak little or no English and depend on interpreters, diminishing the force of their evidence; many are traumatised and vulnerable, impairing their ability to give coherent evidence. By contrast, workers' employers are generally able to call witness evidence of a number of family members who are very frequently highly educated, professional people able to communicate effectively with the Tribunal

- even in cases where the Respondent would have little chance of benefitting from the family worker exemption, it is relied upon in order to place a further burden on the claimant and render it more difficult for her in practice to take advantage of her legal rights. ATLEU lawyers have experience of a limited company asserting that it can take advantage of the family worker exemption and of a member of a Saudi royal family claiming that the exemption applied to an illiterate Sudanese worker in his employ.

Court of Appeal Judgment

In November 2012, Judgment was handed down by the Court of Appeal in the joined appeals of Nambalat v Taher and Tayeb, Salim Udin v Chamsi [2013] ICR 1024. Despite the Court acknowledging that the exemption should be narrowly applied, in that appeal the family worker exemption was found to apply to:

1) *Ms Salim Udin.* In this case the Claimant had been found by the UK Border Agency to be a victim of trafficking. She had sought work overseas for the purpose of supporting her children in Indonesia. After an initial year working for the Respondents' family members in the Middle East, she was employed in London from October 2004 until February 2009. She had no days away from the family during this time and returned to her family in Indonesia only once, after being away from her children for 4 years. The Employment Tribunal found that she normally worked 75.45 hours per week and that some weeks she worked as much as 94.75 hours. The Claimant had her own bedroom for the early stages of her employment but was subsequently required to share with two young children, and finally slept in the dining room on a fold away mattress. She was paid a total of £8,080 over the course of 4 years and 3 months employment, being an average of £155 per month. This is an hourly rate of 46 pence. The value of the national minimum wage claim, were it to succeed, would come to £93,251.69.

2) *Ms Nambalat*. This Claimant was found by the Employment Tribunal to be a "general housekeeper and child minder". Detailed findings were not made on her hours of work, but it appears to have been accepted that she worked full time in this role since the Tribunal found that she had an afternoon break of 1.5 hours per day. She worked 6.5 days per week. For this work she was paid between £180 and £250 per week over the course of her employment, constituting a substantial underpayment by reference to the national minimum wage. As for treatment as a member of the family, the Tribunal found that the Claimant's room was a room which the family used - the doors were generally left open (i.e. she did not have her own private living space). Some meals were taken together with members of the family: out of choice the Claimant did not generally take meals with the family. The Claimant did the bulk of the work, though some tasks (cooking and clearing up after meals) were shared. The Claimant shared leisure activities with the children. She declined when invited to the cinema and to family occasions.

In each case, the Claimants' salaries were sent home to their families as remittances. They were not given pocket money for their own expenditure. They had travelled overseas not for the purpose of cultural exchange or language learning, but to support dependent children in their home countries. As a result of the application of the family worker exemption, the national minimum wage regime gave them no entitlement to pay. The following criteria (considered by the BAAP to be determinative of whether or not a person is entitled to the national minimum wage) were not relevant:

- the Claimants were not on a cultural exchange programme
- they were not in the UK to learn about British culture from the host family and share their own culture with them
- they did not have their own private room in the house, provided free of charge
- they did not normally eat their main meals with the host family

- their work was not limited to light housework and childcare for around 30 hours a week, with a couple of evenings babysitting
- they did not get reasonable pocket money – their money was sent home to their families
- they were not given the facility to attend English language classes at a local college in their spare time
- they were not given time to study nor facilitated to practise their English with the host family
- they did not travel home to see their family during the year

The Court of Appeal's finding that the family worker exemption was correctly applied in these cases has reinforced the concerns of NGOs that the exemption will be used as a vehicle for abuse.

The following legal findings, taken from the Employment Tribunal Judgment in the case of Salim Udin v Chamsi Pasha and endorsed by the Court of Appeal, are of particular concern:

In relation to treatment

> "the notion of being included as a member of a family *does not require parity of treatment* with family members."

In relation to meals:

> "*the Regulations refer to the provision, not sharing, of meals* and we do not read them as requiring that meals be eaten together, or even that the same meals be taken."

In relation to tasks:

> "The concept of sharing tasks, must, it seems to us, be interpreted in the context of what it is that the worker is employed to do. If a primary employment duty of the worker is to get children ready for school in the morning, the exemption clearly does not depend on that task being shared with other members of the family. To put it another way, *the domestic worker does not need to share her role with other members of the family in order to fall within the exemption*. It seems to us that the reference to 'tasks' is aimed at routine household jobs and chores outside the scope of the worker's employment which one would expect members of a family to share as a matter of course."

In relation to accommodation:

> "the Tribunal is not required, or indeed permitted, to reason that, since a mature female member of the family might have been better accommodated than the Claimant, the exemption fails on the accommodation ground."

> "*The test is* whether, in the provision and allocation of accommodation, the worker was treated as a member of the family and *not whether a particular standard of accommodation was provided*."

On the current reading of the law it is possible therefore for the exemption to apply even where:

1. there is an absence of parity of treatment between the worker and other family members;
2. the worker is not provided with his or her own bedroom; indeed where a poor level of accommodation is provided;
3. the worker is treated less well than a family member of her age and gender would be treated;
4. there is no sharing of meals;
5. the worker performs the majority of the household tasks, with only some tasks outside the workers' contractual tasks being shared.

The Court of Appeal introduced an additional concern by finding, despite the express provision of the "accommodation offset" in regulations 30(2) and 36(1), the Court of Appeal **[paragraph 42]** that:

> "a person receiving free accommodation and meals may be expected to perform more household duties for the family than other family members"

Legal aid changes

Recent changes to legal aid funding have deepened ATLEU's concerns.

For cases referred to solicitors from 1 April 2013, workers will only be able to obtain legal aid if they have been trafficked. Victims of severe exploitation, or even of forced labour, will not have that right unless the Claimant meets the trafficking definition.

Overseas domestic workers who are not trafficked will have no assistance in preparing and responding to evidence in relation to the family worker exemption. Without skilled cross-examination, overseas domestic workers will have limited prospects of discrediting their employers. They will also have to litigate on the complex law of the family worker exemption, a matter on which the Court of Appeal has found it necessary to give detailed guidance. They are likely to be at an unfair disadvantage as against employers who usually are able to afford legal representation.

Changes to the domestic worker visa

Similarly, since 6 April 2012 new workers entering the UK on a domestic worker visa may only stay in the UK for a maximum of 6 months. This will not be enough time to enable workers escaping exploitative employment situations to litigate employment tribunal claims.

Taken together with the absence of a concrete entitlement to payment of the national minimum wage, employers will have still less incentive to settle claims, knowing that workers will be removed from the UK before reaching tribunal.

Conclusion

The lack of certainty in relation to the application of Regulation 2(2) has meant that domestic workers who have attempted to seek assistance via the HMRC enforcement team are told that they have no right to the national minimum wage without further consideration of the worker's position. Indeed ATLEU have successfully obtained the national minimum wage for clients who had initially unsuccessfully sought to enforce their rights via HMRC.

Although an unintended result, Regulation 2(2) as currently drafted has facilitated and shrouded domestic servitude. This is an undesirable position that must be addressed. Review of the exemption would both ensure protection of a vulnerable group of workers and provide certainty to employers.

Not only is the law as currently drafted uncertain and hard for employers and employees to negotiate, it is also subject to challenge on the grounds that it offends against European sex discrimination law; the great majority of domestic workers are women so the exemption has a disproportionate adverse impact on one gender. This adds a further level of uncertainty to the law and one which is not obvious on the face of the statute. Due to the nature of the visa route by which they enter the UK, overseas domestic workers are also exclusively non-European, meaning the provision also has a discriminatory impact on the basis of race.

ATLEU's recommendations

ATLEU would submit that changes be made to the definition contained with regulation 2(2) to:

1. Restrict the application of Regulation 2(2) to those who are actually members of the employers' family, or

2. If the intention is to exclude those who are genuinely defined as au pairs then Regulation 2(2) should be amended to express this and reflect the definition provided by the British Au-pairs Agencies Association.

Regulation 2(2) is an exemption that should be construed narrowly and therefore the exception rather than the rule. Guidance on the exemption should be explicit in stating this and advise potential employers to seek advice.

Anti-Trafficking and Labour Exploitation Unit
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