



**Low Incomes  
Tax Reform  
Group.**

A voice for the unrepresented

**Low Pay Commission consultation 2021  
Response from the Low Incomes Tax Reform Group (LITRG)**

**1 Executive Summary**

- 1.1 As a group of tax specialists with interest and insight into both the pay and tax issues facing the low paid and the difficulties ‘accidental employers’ have in meeting their obligations, we welcome the opportunity to respond to this consultation. We would specifically like to make some comments on the live-in domestic worker exemption.
- 1.2 Section 57(3) of the National Minimum Wage Regulations 2015 sets out an exemption from the minimum wage, for work done by a worker in relation to an employer’s family household. This exemption applies if the worker lives in the employer’s family home and is treated as a member of the family. It was originally intended to apply to au pair arrangements, but we understand there is some concern that it is being used in other situations by employers of domestic workers (who are often migrant women) in circumstances which are far removed from au pair arrangements.
- 1.3 We think it is right to review how the exemption is currently being used, whether that usage meets the original policy objectives and its impacts from an equalities perspective. We cannot see there is any rationale for domestic workers to be excluded from the minimum wage.
- 1.4 Furthermore, any ‘pocket money’ such workers get is likely to be paid outside a PAYE scheme (because employee earnings need to be at least £120 per week before someone needs to formally register as an employer in most cases). This means there is no data on these workers and employers and HMRC and other enforcement bodies have no visibility to them. All of this simply compounds the vulnerability of these workers.

- 1.5 It is arguable that genuine au pairs are a distinct group, and in our response, we offer some high-level observations around the potential costs and responsibilities for host families if the exemption were removed for them, based on what we know about those parts of the system within our remit. These include the cost of the minimum wage itself, but also the need for host families to register as an employer with HMRC and comply with other employer obligations like auto enrolment.
- 1.6 The removal of the minimum wage exemption for au pairs may prevent the positive experience of au pairs working in families by making them unaffordable. In addition, the administrative effects of paying an au pair at or above £120 a week, may impose too great a burden on prospective host families, affecting their ability to go out and work themselves.
- 1.7 In cases where families still felt able to take on au pairs, the fact that au pairs would presumably become more akin to 'nannies', means that host families may then expect to be able to use Tax Free Childcare or other government childcare initiatives to support them. However, given the need for 'qualifying' childcare providers to be used by families under these support schemes, currently this would not be possible.

## **2 About Us**

- 2.1 The Low Incomes Tax Reform Group (LITRG) is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HM Revenue & Customs (HMRC) and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and related welfare laws and administrative systems are not designed with the low-income user in mind, and this often makes life difficult for those we try to help.
- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.

### 3 General comments on the exemption

- 3.1 We understand that the ‘family worker’ exemption<sup>1</sup> was originally intended to apply to au pairs, following representations by au pairs’ organisations, concerned that the national minimum wage would disrupt the experience of both au pairs and host families<sup>2</sup>.
- 3.2 However, it seems that the exemption is being used in a wider range of circumstances far beyond this, and indeed, in employment relationships which could be construed as being ones of domestic servitude in some circumstances.
- 3.3 For example, from reading the exact wording of the Section 57(3) of the National Minimum Wage Regulations 2015 exemption in law<sup>3</sup>, it seems possible for the exemption to apply where (for example):
- there is an absence of parity of treatment between the worker and other family members;
  - the worker is not provided with his or her own bedroom; indeed, where a poor level of accommodation is provided;
  - there is no sharing of meals;
  - the worker performs the majority of the household tasks.
- 3.4 Thus, we think the current provision provides a loophole for potential abuse.
- 3.5 The non-payment of minimum wage for what may well be carrying out specific and concrete tasks such as cleaning, cooking, shopping or the provision of care for children, elderly or disabled people, is an issue in itself. But there is a knock-on effect in that, because of the exemption, any ‘pocket money’ such workers get is likely to be paid outside a PAYE scheme (because employee earnings must be at least £120 per week before someone needs to

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<sup>1</sup> <https://www.legislation.gov.uk/ukdsi/2015/9780111127964>

<sup>2</sup> [https://publications.parliament.uk/pa/cm199899/cmhansrd/vo990225/debtext/90225-31.htm#90225-31\\_spnew1](https://publications.parliament.uk/pa/cm199899/cmhansrd/vo990225/debtext/90225-31.htm#90225-31_spnew1)

<sup>3</sup> Work does not include work relating to family household

57.— (1) In these Regulations, “work” does not include any work done by a worker in relation to an employer’s family household if the requirements in paragraphs (2) or (3) are met.

(2) The requirements are all of the following:

(a) the worker is a member of the employer’s family;  
(b) the worker resides in the family home of the employer;  
(c) the worker shares in the tasks and activities of the family.

(3) The requirements are all of the following:

(a) the worker resides in the family home of the worker’s employer;  
(b) the worker is not a member of that family, but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities;  
(c) the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;  
(d) if the work had been done by a member of the employer’s family, it would not be treated as work or as performed under a worker’s contract because the requirements in paragraph (2) would be met.

formally register as an employer in most cases<sup>1</sup>). This means there is no data on these workers and employers, HMRC and other enforcement bodies have no visibility to them and as (in our experience) workers are unlikely to be given payslips where there is no PAYE obligation (which is incorrect), the workers will be less well documented. All of this simply compounds the vulnerability of the workers.

- 3.6 Even where the worker knows that the exact requirements for the exemption are not met, for example, because they do not *share* in the tasks and leisure activities of the family, we think that the workers will have a problem being able to articulate their case to HMRC or via an Employment Tribunal to try to challenge the non-payment of NMW. The isolated nature of work in private houses places these workers at a disadvantage, since they are generally their only witness of fact; they may be migrant workers and so speak little or no English and some are vulnerable, impairing their ability to give coherent evidence. All of this means that they are likely to be at an unfair disadvantage as against employers - who are usually articulate and able to afford legal representation.
- 3.7 Furthermore, in the recent case of *Puthenveetil v Alexander & George, & Others*<sup>2</sup>, an Employment Tribunal decided that the statutory exemption of some domestic workers from entitlement to the national minimum wage is sex discrimination.
- 3.8 Because of the vulnerability of their circumstances, and as a matter of general principle for all the reasons set out above, we think the government should take the next available opportunity to legislate and clarify the entitlement of migrant domestic workers to the National Minimum Wage (and also to consider the suitability of the broader employment law on domestic workers<sup>3</sup>).
- 3.9 ***Practical considerations if the exemption is removed***

A default entitlement to the National Minimum Wage will put these workers in a stronger position, however it is conceivable some employers will still simply not pay it. As such, HMRC's guidance on NMW entitlement for domestic workers and the form that workers can use to complain to HMRC<sup>4</sup> needs to be made as user friendly as possible, bearing in mind the characteristics of this new population of workers being brought into the system.

- 3.9.1 For example, although we are aware that HMRC do not currently provide any information to migrant workers in their own language, in our view, a short guide in a selection of different

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<sup>1</sup> <https://www.gov.uk/pay-for-employers>

<sup>2</sup> <https://www.gov.uk/employment-appeal-tribunal-decisions/ms-k-p-k-puthenveetil-v-mr-s-alexander-and-others-ukeat-0165-17-dm>

<sup>3</sup> For example, we understand Regulation 19 of the Working Time Regulations 1998 excludes those "employed as a domestic servant in a private household" from a number of key provisions, including the maximum weekly working time.

<sup>4</sup> <https://www.gov.uk/pay-and-work-rights>

languages on pay and taxes in the UK, may really help domestic workers understand their NMW and other entitlements and will make HMRC's enforcement processes as easy as possible for them to navigate.

- 3.9.2 In this regard, it is also vital that HMRC then undertake proactive risk profiling work around NMW (and PAYE) enforcement. Perhaps too much of the current enforcement framework relies on workers complaining about their engagers. Yet not only may workers struggle to actually make a complaint, as alluded to above, even if they can, it is easy to envisage some workers being afraid of reporting their engager to the authorities for fear of their engager finding out.
- 3.9.3 We can certainly confirm that enquirers to the LITRG website who have found themselves in various difficult situations with their employers have been reluctant to give their real name or send copies of payslips showing what is happening to them. They are likely to be even less forthcoming with the authorities themselves, and we have lost contact with enquirers altogether if we have suggested they make an official complaint – even an anonymous one.
- 3.9.4 In light of all these things, we think that proactive work should have at least as much focus on reactive work to compensate for low-paid workers' inability or unwillingness to complain.

#### **4 Au pairs**

- 4.1 Au pair arrangements usually comprise a situation where a young adult, in a gap year or foreign exchange situation, joins a host family for a few months, and gains the opportunity to study and earn some pocket money, in exchange for some part-time and relatively undemanding domestic work or childcare.
- 4.2 According to the British Au Pair Agencies Association (BAPAA<sup>1</sup>) an au pair should be offered the following as a minimum:
- They have got a signed letter of invitation from the host family that includes details of their stay, for example 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
  - 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 are 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

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<sup>1</sup> <https://umireef.wpengine.com/bapaa/au-pairs/what-is-an-au-pair/>

4.3 Reflecting on the unusual relationship which exists when a genuine au pair is treated as a member of the family and his or her work is done in the context described above, we think it is arguable that genuine au pairs are a distinct group in terms of being entitled to the minimum wage.

4.4 ***Issues to consider if exemption is removed from au pairs.***

4.4.1 If the minimum wage exemption is removed from genuine au pairs, a number of considerations would arise for the host family over and above the need to pay the au pair the minimum wage and for the correct number of hours. (This in itself may not be easy to identify given the casual and 'on demand' circumstances in which the au pair may perform 'work', which may include getting up in the night to attend to children).

4.4.2 For any host family paying an au pair at or above £120 a week (so 14 hours a week for them at say, £9 an hour) the host family will have to (among other things):

- Register as an employer with HMRC<sup>1</sup> and set up a Pay As You Earn (PAYE) scheme - the main purpose of which is for employers to collect tax and National Insurance (NIC) from their employees' wages on behalf of HMRC.
- Give the employee a payslip with each payment<sup>2</sup>.
- Pay Class 1 secondary National Insurance Contributions (For 2021/22, employers pay NIC on any employee's pay over £170 per week at 13.8%. A small employer can claim the Employment Allowance of up to £4,000 a year to reduce their National Insurance bill, but it is not available to employers employing domestic staff<sup>3</sup>).
- Deal with statutory payments - as an employer, paying an au pair at or above £120 a week, means they may also have to pay Statutory Sick Pay (SSP)<sup>4</sup> – currently payable at around £97 a week (for a maximum of 28 weeks). This is not reclaimable from the government. For parental payments, e.g. Statutory Maternity Pay – much, if not all, is reclaimable from the government, but payments can be hugely complicated to understand and administer.
- Pay the tax and NIC to HMRC at the correct time<sup>5</sup>.
- Potentially deal with auto-enrolment<sup>6</sup> - If an employer is paying their au-pair over £192 a week, they will need to tell them about auto-enrolment, check whether they're eligible and if they are, they must set up a pension, enrol them and make the correct

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<sup>1</sup> <https://www.gov.uk/register-employer>

<sup>2</sup> <https://www.gov.uk/running-payroll/payslips>

<sup>3</sup> Since April 2015, the scheme was extended to cover individuals employing certain care and support workers. Employers of other domestic staff (such as chauffeurs, gardeners, nannies) are still excluded from having the allowance: <https://www.gov.uk/government/publications/employment-allowance-more-detailed-guidance/eligibility-for-employment-allowance-further-employer-guidance#domestic-staff>

<sup>4</sup> <https://www.gov.uk/employers-sick-pay>

<sup>5</sup> <https://www.gov.uk/running-payroll/paying-hmrc>

<sup>6</sup> <https://www.gov.uk/workplace-pensions-employers>

contributions. Auto-enrolment affects all employers with staff in the UK. There are no exceptions.<sup>1</sup>

- Keep good records in case of inspection by a regulatory authority such as HMRC<sup>2</sup> or The Pensions Regulator

- 4.4.3 In general, we find that many small employers find PAYE compliance and the associated considerations overwhelming when they take on an employee. They are not HR or payroll experts, and it is often very daunting for them to keep up to date with ever-changing and complex tax and employment law legislation – especially when there are penalties for mistakes. The burden is disproportionate and no doubt acts as a significant disincentive to employing workers for some engagers.
- 4.4.4 Our experience tells us that this is even more so for ‘accidental employers’ (which is perhaps why we continually hear of personal carers who have to undertake intimate and exacting tasks, working for disabled people on a ‘self-employed’ basis). The fact that they are not running a business and often do not have the time or energy required to get to grips with their employer obligations can leave them having to pay an accountant or adviser to assist them (leaving them with further costs), or see them trying to manage things themselves, which if they get wrong, could lead to them being in an extremely difficult position.
- 4.4.5 In short, the removal of the minimum wage exemption for au pairs may prevent the positive experience of au pairs working in families by making them unaffordable. In addition, the administrative effects of paying an au pair at or above £120 a week, may impose too great a burden on prospective host families, impacting on their ability to go out and work themselves.
- 4.4.6 In cases where families still felt able to take on au pairs, the fact that au pairs would presumably become more akin to ‘nannies’ means that the question will arise as to whether the government should provide families with support through incentivised childcare schemes like Tax-free childcare (TFC). (It is worth noting that a whole industry has sprung up to help families manage the costs and responsibilities of taking on nannies.)
- 4.4.7 At the moment, TFC can only be used to pay for childcare from a registered or approved provider – (childcare providers are given a letter or certificate confirming they are registered or approved). Registered or approved childcare currently includes childminders, nurseries and nannies, after school clubs and play schemes. It does not include au pairs.

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<sup>1</sup> If the au pair is in place for less than 3 months, ‘postponement’ may be able to help the host family as this facility allows an employer to ‘defer’ assessing their staff for up to three months.

<sup>2</sup> <https://www.gov.uk/payee-for-employers/keeping-records>

- 4.4.8 Serious consideration will need to be given as to whether it is practical to expect au pairs to sign up as a childcare provider, in order that their host families can access TFC, given the costs and requirements that are involved<sup>1</sup>.

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<sup>1</sup> As set out here: <https://www.nannytax.co.uk/ofsted-requirements-for-nannies>