

Regulation of Au pairs



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Executive Summary

Our objective is to examine the legal status of au pairs who are often excluded from legislation and seldom afforded legal protection. We would focus on the impacts and issues surrounding their exclusion from National Minimum Wage (NMW), lack of working time regulations as well as the deregulation and removal of the au pair visa. In doing so, we would propose three recommendations to the ongoing systemic inequalities and marginalization of au pairs attributed to the UK government's current legislation being outdated, as a reflection of the departure from the European Union. This would be considered alongside the legislation's inability to serve its purpose of protecting workers like au pairs.

National Minimum Wage Exclusion

Current legislation

The National Minimum Wage Act (NWMA) 1998 states, “a person who qualifies for the NMW shall be remunerated by his employer for his work in any pay reference period at a rate which is not below the national minimum wage”.¹ This has often been reconciled with s57(2) of The National Minimum Wage Regulation (NWMR) 2015 which excludes au pairs from the NMW as they are considered family members thus, not defined as a worker.²

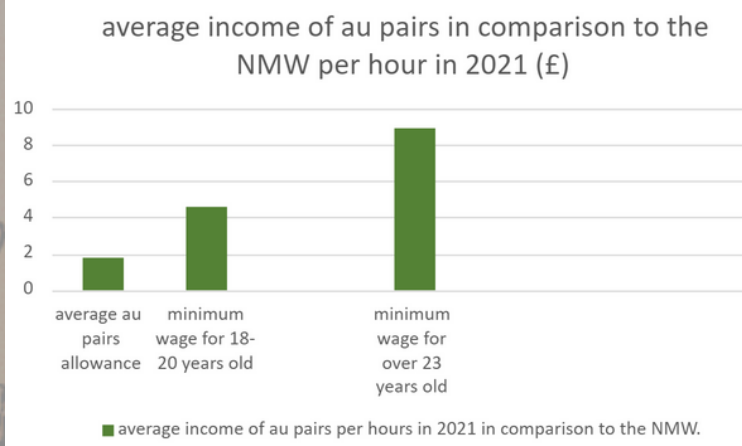
Blurred boundaries

The lack of legal status as a worker for au pairs blurs the boundaries between a family member and an au pair for the purposes of the NWM. This presents a potential exploitation of au pairs as they are obliged to perform work beyond the scope of childcare and light housework without any intention of cultural exchange or a weekly allowance by their host family. This exploitation could be explained by the subjective interpretation of “light housework” by host families because there is currently no clear definition of au Pair work.

Burden of proof

Furthermore, there is a difficulty in conceptualizing the definition of “family member” under the NWMR. This exclusion from wage places the burden of proof on the au pair to prove that they have not been treated as a family member to defend their entitlement to fair compensation.

This is difficult for au pairs to argue because they fear losing their home and lack education on their rights. Thus, highlighting the asymmetry of power that exists between au pairs and the host families.



Recommendation:

Refine s57(2) of NWMR to clearly define the scope of family members such that it excludes au pairs and offers a precise description of the work au pairs are entitled to do for the purpose of wage.

¹ National Minimum Wage Act 1998, s1(1)

² National Minimum Wage Regulation 2015, s57(2)

³ Rosie Cox, 'Think Uber drivers have it bad? Take a look at au pairs' (The Guardian, 30 August 2018)

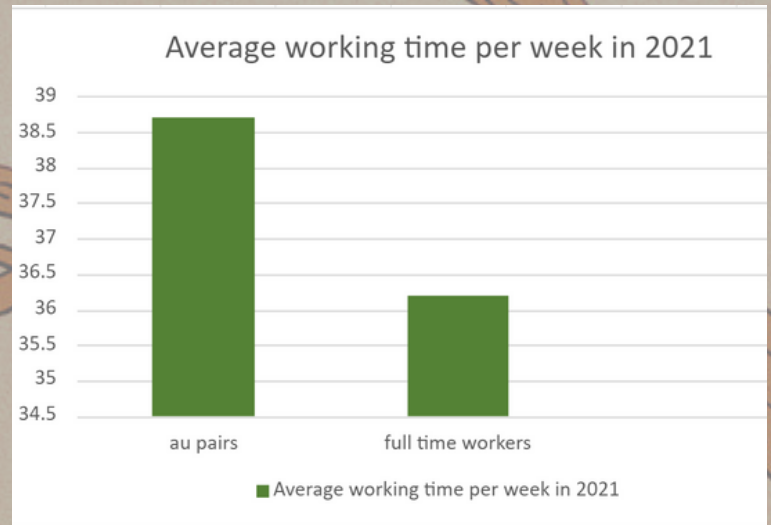
⁴ <<https://www.theguardian.com/commentisfree/2018/aug/30/au-pairs-servants-legal-rights-government>> accessed 10 March 2022

Anti-Trafficking an Exploitation Unit, Submissions to the Low Pay Commission in relation to the “family worker exemption” (October 2013)

Au pairs treated like full-time workers

Relevant legislation:

The Working Time Regulations 1998 (WTR) provides workers with several rights regarding working hours.¹ For instance, as per regulation 4(1), workers benefit from the right not to “exceed an average of 48 hours for each seven days²”.



Asymmetry of power:

For the purposes of the au pair scheme, Au Pairs should be considered as part-time helpers which will give them enough leave time to join English classes and improve their skills as part of the cultural exchange objective of being an Au Pair. However, in a study conducted by the Economic and Social Research Council (ESRC), with regards to working time, they found that au pairs have a full-time occupation that resembles the role of nannies. Thus, the exclusion of au pairs from the WTR led to their exploitation. In fact, Au Pairs work for an average of 38.7⁴ hours a week which is more than the average amount of hours that a full-time worker endures in a week (36.3 hours).⁵

Recommendation:

The WTR should expand its scope to include Au Pairs and construe them as part-time helpers with protection regarding working time.

⁵ Working Time Regulation 1998.

⁶ Working Time Regulation 1998, 4 (1).

⁷ Dr. Rosie Cox and Dr. Nicole Busch 'Au pairing after the au pair scheme? New migration rules and childcare in private homes in the UK' (Birkbeck University of London) <<https://www.bbk.ac.uk/downloads/news/au-pairing-briefing.pdf>> accessed 15 March 2022.

⁸ *ibid.*

⁹ D. Clarke 'Average weekly hours of work for full-time workers in the United Kingdom from May 1992 to January 2022' (Statista) <<https://www.statista.com/statistics/280763/average-working-hours-uk/>> accessed 15 March 2022.

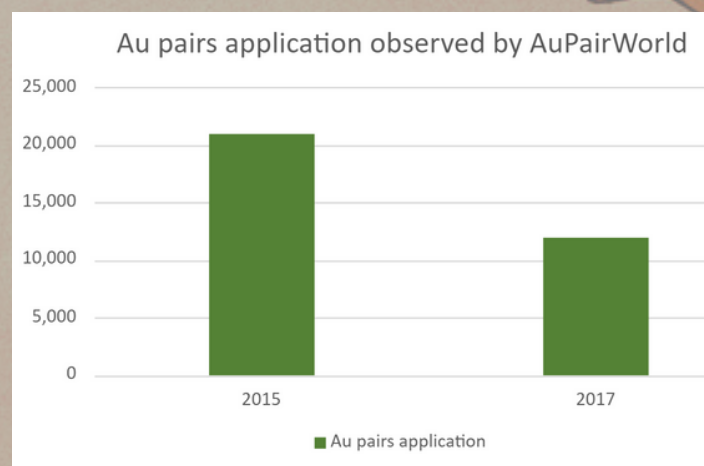
The deregulation and removal of the Au Pair Visa

Previous Legislation

Before 2008, the Au Pair visa scheme allowed 'a single person between 17 and 27 to come to the United Kingdom and live with an English-speaking family for up to two years', as per the Home Office in 2006. However, as of 2008, the British Government deregulated au pairing by closing visa scheme, reflecting a general approach of deregulation of the labour market.

The current regulatory vacuum:

From 2008, the entry and stay of Au Pairs in the UK was no longer governed by the Home Office regulations, with no replacement governmental authority suggested. Instead, the Home Office turns to the British Au Pair Agencies Association (BAPAA) website for clarity.¹ This legal ambiguity fosters a situation in which au pairs are viewed as 'non-workers' with no entitlement to minimum wage.²



The issue of leaving the European Union:

There has been a shift from it being overseen by the Home Office to now being a term without legal definition whilst relying on the policy of free movement under the EU. However, free movement no longer negates the visa removal due to departure from the EU in 2016, with the BAPAA now lobbying the government to amend visa rights.³ Despite this, the Home Office declined to amend the rules. In a letter to BAPAA, the6 stated: 'The UK's points-based immigration system will not offer a dedicated route for au pairs.'

Recommendations:

A specific visa for Au Pairs through amending the point-based system. With the UK being able to draw upon the good practice of Germany who have a special visa for Au Pairs.

¹⁰ 'What is an Au Pair?' (British Au Pair Agencies Association)
<https://bapaa.org.uk/host-families/what-is-an-au-pair/> > Accessed March 16 2022

¹¹ Nicole Busch, 'When Work Doesn't Pay: Outcomes of a Deregulated Childcare Market and Au Pair Policy Vacuum in the UK' (2015), Macmillan, 59

¹² Kate Scotter, 'Brexit: 'Au pairs are a practical solution to a big problem' (BBC News, December 2020)
<https://www.bbc.co.uk/news/uk-england-suffolk-55309088> > Accessed 15 March 2022

Recommendations

- Refine s57(2) of NMWR to clearly define the scope of family members such that it excludes Au Pairs and offers a precise description of the work au pairs are entitled to do for the purpose of wage.
- The WTR should expand its scope to include Au Pairs and construe them as part-time helpers with protection regarding working time.
- A specific visa for Au Pairs through amending the point-based system. With the UK being able to draw upon the good practice of Germany who have a special visa for Au Pairs.

Bibliography

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<<https://bapaa.org.uk/host-families/what-is-an-au-pair/>> Accessed

March 16 2022

Appendix

Au Pair - According to AuPair.com, an au pair is a young person between the ages of 18-30, living abroad with a Host Family and taking care of the children with light housework. In exchange for accommodation and pocket money for the purpose of cultural exchange.

Nanny - A nanny (also known as home childcarers) is a standard employee protected by National Minimum Wage, whose main responsibilities involve the care of the family's children and housework.

The National Minimum Wage Regulations 2015, Section 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

The Working Time Regulations 1998, regulation 4:

Maximum Weekly Working Time

4-(1) Subject to regulation 5, a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.

Home Office - The Home Office is the lead government department for immigration and passports, drugs policy, crime, fire, counterterrorism and police .

British Au Pair Agencies Association (BAPAA) - The BAPAA is the only recognised Trade Association for the British Au Pair Industry and was formed on a non-commercial basis with the sole purpose of setting standards for the AU Pair industry.

Word Count Excluding footnotes and graphs

976

Contributions

- Phoebe Agyarko - Executive Summary & National Minimum Wage Exclusion
- Thea Rita Andrioti - Au Pairs treated like full-time workers & created the graphs
- Lucas Burke - The deregulation and removal of the Au Pair visa & Appendix