



KALAYAAN

justice for migrant domestic workers

Low Pay Commission
6th Floor
Victoria House
Southampton Row
London
WC1B 4AD

26th September 2014

Dear Sir/Madam,

Re: Kalayaan's response to Low Pay Commission Consultation 2015

We write in response to the Low Pay Commission's letter of the 3rd July 2014 requesting us to submit evidence to its consultation on the National Minimum Wage.

Kalayaan welcomes the Low Pay Commission's recognition in its 2014 report of the particular difficulties faced by migrant domestic workers in enforcing their right to the National Minimum Wage (NMW) and its recommendation that the looks again at the family worker exemption and legislate and clarify the entitlements of migrant domestic workers to the NRM.

Areas to be addressed

Kalayaan was established in 1987 and is the leading organisation in the UK providing advice, advocacy and support services for migrant domestic workers. Kalayaan also campaigns for the rights of migrant domestic workers in the UK. Therefore, in answering the Low Pay Commission's consultation letter, Kalayaan will specifically address the questions relevant to migrant domestic workers, in particular:

- What issues are there for compliance with the NMW? Do particular groups experience problems with NMW compliance (for example, apprentices, or interns and others undertaking work experience)? Does this non-compliance have implications for the level of the NMW rates, the quality and accessibility of official guidance on the NMW, or for the enforcement work of HMRC?
- Do you have any other views or evidence about the operation and impact of the National Minimum Wage?

Issues for compliance with the NMW for migrant domestic workers

Migrant domestic workers in the UK on a valid domestic worker visa are entitled to the National Minimum Wage. The Home Office has made this clear in various

St. Francis Centre, 13 Hippodrome Place, London, W11 4SF

Tel: + 44 (0)20 7243 2942 Fax: +44 (0)20 7792 3060

www.kalayaan.org.uk Email: catherine@kalayaan.org.uk

Registered charity in England and Wales n. 1146596
Registered company in England and Wales n. 7968872

publications, namely documents for an application for entry clearance to the UK and subsequent applications for further leave to remain in the UK. However, in Kalayaan's experience many domestic worker are paid significantly less than their entitlement under the National Minimum Wage. In Kalayaan's experience the following factors impact on compliance with the NRM for this group of workers:

Changes to the migrant domestic worker visa

Since 6 April 2012 migrant domestic workers coming to the UK can only do so for a maximum of 6 months and are prohibited from changing their employer. Migrant domestic workers who do leave their employer breach immigration rules, therefore they are in effect tied to their employer. This change leaves them in practice often unable to access their rights in UK employment law including the National Minimum Wage and denies them the right to challenge any mistreatment or violation of their rights. Migrant domestic workers who enter the UK accompanying diplomats are also prevented from changing employers although they can remain in the UK with the same employer for up to 5 years. For these workers their inability to challenge mistreatment by their employers is compounded by their employers' claims to diplomatic immunity.

Kalayaan has found that abuse of migrant domestic workers has increased considerably since the 'tied' migrant domestic worker was introduced. In the two years to 4 April 2014, 60% of domestic workers on the 'tied' visa registering with Kalayaan were earning less than £50 compared with 36% on the original visa. The following brief case study demonstrates the difficulties experienced by migrant domestic workers on the 'tied' visa in enforcing their rights (See enclosed briefing)

'Leena' came to the UK on the 'tied' migrant domestic worker visa in April 2014. She has accompanied her employer every year to the UK for several months for the last 6 years. She works approximately 16 hours a day, 7 days a week. However, since April Leena has received one payment of £100. Leena speaks little English and was not aware of her entitlement to the NMW. It is impossible for Leena to seek redress while still working for her abusive employer. However if she leaves her employer she are in breach of the immigration rules and would have no means to support herself during any legal proceedings.

While recognizing that immigration matters are outside the remit of the Low Pay Commission, Kalayaan believes the continuation of the current visa regime has led to increased non-compliance with the National Minimum Wage by employers of domestic workers on the tied visa.

Lack of information available to domestic workers

Many domestic workers coming to the UK are not aware of their rights under UK employment law. The Home Office has produced a leaflet¹ which is to be distributed to domestic workers when an application for entry clearance is made. This leaflet explains a domestic worker's rights in the UK (including the right to be paid the NMW) as well as where to seek help whilst in the UK. In Kalayaan's experience, the

¹ <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/ecis/ecg/dworkers-informationsheet.pdf>

vast majority of domestic workers registering with us have never been given any information on their rights within the UK by embassy staff abroad. It is also common in Kalayaan's experience that the vast majority of domestic workers are not called for interview for their entry clearance application.

Family worker exemption

The application of Section 2(2) of the National Minimum Wage Regulations 1999 'family worker exemption' has served in some cases to deny migrant domestic workers their right to the National Minimum Wage. This issue is being dealt with comprehensively in the submission by ATLEU and we fully agree with their position in relation to this exemption.

The National Minimum Wage as a condition for entry clearance and further leave

Although the Home Office stipulates that domestic workers must be paid the National Minimum Wage, sufficient checks are not made to ensure that this requirement is met. Where Kalayaan has assisted domestic workers to obtain a copy of their file from the Home Office, we have noticed a large proportion of applications for further leave to remain do not comply with the NMW, yet these applications are still approved despite it being clear that there isn't compliance. The application form for further leave to remain² clearly states that an employer must confirm they are complying with the National Minimum Wage in their supporting documentation.

Kalayaan's employment case referrals

Kalayaan continues to make referrals to employment solicitors for migrant domestic workers who have not been paid in according with UK employment legislation. Since the detrimental legal aid cuts in April 2013, Kalayaan has noted significant difficulty in obtaining representation for clients wishing to take legal action against their employers in enforcing the National Minimum Wage. Pro bono firms are being inundated with requests from various organisations and are having to turn away the majority of these.

Since April 2014, it is now an official requirement for a claimant to engage in an 'early conciliation' process with the assistance of ACAS who provide free negotiation services. This process can take up to a month, at the end of which a certificate is granted allowing a claimant to proceed to the tribunal should they be unable to reach a compromise with their previous employers. In Kalayaan's experience, employment cases involving domestic workers tend to be incredibly complex involving years of servitude and breaches of most aspects of employment law. Therefore, we have not had any successes in achieving settlement with employers since this conciliation process became compulsory.

Between August 2013 and August 2014, Kalayaan has made 12 referrals to employment solicitors for advice. Of these:

- 4 clients have taken legal advice and have issued legal proceedings in the courts.

2

- 3 clients are currently within the ACAS early conciliation period and intend to issue proceedings if they cannot negotiate with their employer.
- 2 clients are being advised on their options.
- 1 case is listed for hearing in the employment tribunal in January 2015.
- 1 case has settled for £26,000.
- 1 client took advice but decided not to proceed with any further action.

This is significant reduction in the number of clients who we can refer for employment advice compared to previous years. Clients whose situations come within the definition of human trafficking are the only ones allowed to access legal aid, which is a very small proportion of our clients. Kalayaan has therefore relied on the generosity of city law firms to advise pro bono. In some cases where we have been unable to secure representation, we have assisted clients to go through ACAS to try and see if the employers are willing to settle, which has proved unsuccessful. We have also begun referring clients to lawyers operating under a conditional fee arrangement ('No Win No Fee') as an alternative means of finding representation. Kalayaan is attempting to increase its pool of pro bono solicitors.

Research into advice on the National Minimum Wage and the Family Worker Exemption

Kalayaan has received numerous phone calls over the past few months from employers who have stated that various organisations have told them that they do not need to comply with the National Minimum Wage if their domestic worker lives in their house and they give them free accommodation. We find this incredibly worrying as it appears to be a severe lack of understanding of the Family Worker Exemption (which we are firmly against) and a simplification of this particularly complicated regulation.

Kalayaan therefore decided to undertake some basic research and call various organisations that advice on pay to see what advice they would give a potential employer. We called the Pay & Work Rights Helpline, Staff Tax/Nanny Tax and HMRC. We have only made one phone call to each organisation and aim to call again, as well as calling other advice organisations.

Our findings showed that the Pay and Work Rights Helpline³ advised us correctly on the technicalities of the Family Worker Exemption by going into in depth about the treatment of the worker and whether they would be sharing in family tasks, holidays and leisure activities. HMRC⁴ said they could not advise on pay matters and could only deal with tax issues. Staff Tax/Nanny Tax⁵ advised us that if a worker is living in your house, has free food, rent and utilities, you do not have to pay them the national minimum wage. We were advised that we can pay the worker whatever we wanted to providing it is agreed between both parties. This is incredibly worrying as Staff Tax/Nanny Tax are a private sector organisation that give advice on wages, taxes and finances to domestic employers and could potentially be advising thousands of employer incorrectly. Kalayaan will be continuing with our research which is in its early stages.

³ Called on 19th September 2014 at 14:34 pm

⁴ Called on 19th September at 15:42pm

⁵ Called on 19th September at 14:56pm

We will be happy to provide any further information you require and look forward to the opportunity to meet the Commissioners later on this year.

Yours sincerely,

Karan Singh
Community Advocate

Catherine Kenny,
Community Advocate

St. Francis Centre, 13 Hippodrome Place, London, W11 4SF
Tel: + 44 (0)20 7243 2942 Fax: +44 (0)20 7792 3060
www.kalayaan.org.uk Email: catherine@kalayaan.org.uk

Registered charity in England and Wales n. 1146596
Registered company in England and Wales n. 7968872