

pay due to a worker when taking annual leave.

In the case of *Bear Scotland Ltd and others; Hertel (UK) Ltd; Amec Group Ltd v Fulton and others; Woods and others; Law and others* UKEATS/0047/13/BI, UKEAT/0160/14/SM and UKEAT/0161/14/SM, the EAT decided that workers are entitled to be paid a sum of money to reflect normal non-guaranteed overtime as part of the annual leave payments under the Working Time Regulations 1998 SI No 1833 (WTR) as derived from Council Directive 93/104/EC (the Working Time Directive (WTD)), in respect of the basic four weeks' leave only and not the additional 1.6 weeks added by subsequent amendment to the WTR.

In *British Gas Trading Ltd v Lock and another* UKEAT/0189/15/BA, the EAT found that following the approach adopted in *Bear Scotland*, WTR reg 13 can be interpreted compatibly with the WTD so as to include results-based commission payments in the calculation of holiday pay for the basic four weeks' annual leave. The following case considered the position regarding voluntary overtime.

- **Dudley MBC v Willetts and others** UKEAT/0334/16/JOJ, 31 July 2017

The EAT held that payment for voluntary overtime that is normally worked is within the scope of WTD article 7 and therefore within the concept of 'normal remuneration' for the purposes of calculating holiday pay under WTR reg 13.

Many workers are denied paid annual leave under the WTR because they do not know of their entitlement or the right is refused or denied by their employer. This state of affairs could have occurred over many years before a worker becomes aware of the true position.

It is possible to seek compensation for the denial of the right to paid annual leave under WTR reg 30, but claims must be brought within the primary ET time limit of three months. It is also possible to bring a claim of unauthorised deductions from wages under ERA 1996 s13 where the claim can include a series of deductions over a longer period as long as the deductions continue into the three-month primary time limit.

However, this second option has been very much diminished by two things. First, claims for most types of unauthorised deductions from wages can only be brought in respect of deductions occurring within two years of presentation of the claim, as a result

of a change to the law effected by the Deduction from Wages (Limitation) Regulations 2014 SI No 3322 (for more details see March 2015 *Legal Action* 24). Those regulations also made it impossible to pursue the matter in the civil courts because they stipulated that the right to payment in respect of annual leave is not contractual but purely statutory. Second, the EAT decision in the following case.

- **Fulton and Baxter v Bear Scotland Ltd** UKEATS/0010/16/JW, 9 December 2016

The EAT held that a three-month gap between non- and underpayments of wages breaks the series of deductions for the purpose of the time limit in respect of unauthorised deductions from wages claims. The EAT found that it was bound by its previous interpretation of this matter in its earlier decision in the same litigation and could not depart from it.

#### Unfair dismissal

One might have thought that if a dismissal was found to be discriminatory it would also be unfair. However, this issue came under scrutiny before the Court of Appeal in the following case.

- **O'Brien v Bolton St Catherine's Academy** [2017] EWCA Civ 145, 15 March 2017

The Court of Appeal held that it was legitimate for an ET to decide, having found that the dismissal of a teacher on long-term sick leave was disproportionate and therefore unjustified under EA 2010 s15, that it must also be unreasonable and therefore unfair under ERA 1996 s98(4). The court recognised that the language and the standards of the two tests are of course different, but stated that it would be a pity if there were any real distinction in the context of dismissal for long-term sickness where the employee is disabled within the meaning of the EA 2010.

- 1 [www.gov.uk/employment-tribunals/make-a-claim?mc\\_cid=117593dd4f&mc\\_eid=e5bd80bced](http://www.gov.uk/employment-tribunals/make-a-claim?mc_cid=117593dd4f&mc_eid=e5bd80bced).
- 2 [www.judiciary.gov.uk/publications/directions-employment-tribunals-england-wales/](http://www.judiciary.gov.uk/publications/directions-employment-tribunals-england-wales/).
- 3 [www.judiciary.gov.uk/publications/directions-for-employment-tribunals-scotland/](http://www.judiciary.gov.uk/publications/directions-for-employment-tribunals-scotland/).
- 4 [www.judiciary.gov.uk/publications/compensation-for-loss-of-pension-rights-in-employment-tribunals/](http://www.judiciary.gov.uk/publications/compensation-for-loss-of-pension-rights-in-employment-tribunals/).

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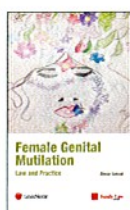
## Book review

### *Female genital mutilation: law and practice*

Zimran Samuel

Family Law, ISBN 978 1 78473 333 9, April 2017, £65.

#### Cris McCurley praises an important work by a specialist in the field.



As a practitioner who regularly deals with what are now referred to as 'harmful cultural practices', I was delighted to see this book in print. It brings the law together in one easily accessible place and explains the complexities involved to the uninitiated, who may be instructed in a case involving female genital mutilation (FGM), giving them the tools to work with the issue safely.

FGM has been illegal in the UK since the Prohibition of Female Circumcision Act 1985, but it is only very recently, as a result of the changes made to the Female Genital Mutilation Act 2003 by the Serious Crime Act 2015, that true protection, rights and obligations (on families and professionals) have been clearly, legally, set out.

Samuel is an award-winning\* and dynamic barrister who has recently moved to Doughty Street Chambers. He has made FGM one of his specialist practice areas, and has been in the vanguard of the recent reported cases and the new law. His passion for the subject is obvious in his writing and he tackles this delicate issue with thoroughness and sensitivity.

The 'opening comment' section, by Dexter Dias QC, addresses the 'what, when and how' of FGM while rightly commending Samuel's campaigning and policy work in this area of law, as well as his advocacy in the protection of the vulnerable in court.

In this slim volume, he manages to pack in all of the reported cases to date, with an excellent analysis of the complex and often multi-faceted issues that face the inexperienced practitioner when

suddenly confronted with FGM for the first time. However, it is also a valuable reference for those working with FGM on a regular basis.

The accessible layout and tables take the reader through the international law and treaties that impact this issue, which will be new territory to the majority of family lawyers. There is a very helpful reference list of the countries in which FGM is practised and the local name by which a client from one of those countries may refer to this abhorrent breach of human rights when seeking help and protection from the profession.

The first chapter introduces the subject of FGM, both as a physical intrusion on the right to bodily integrity and as a lifelong, and often life-limiting, burden borne by women around the globe. Chapter 10 outlines the issues from immigration law and practice that can stray into FGM family law cases and create professional panic and unwanted complications if not properly addressed.

Chapter 8 introduces FGM from a children's public law perspective (which is how many solicitors and counsel may well first encounter FGM) and the complexities of safeguarding, risk assessment and threshold. The following chapter addresses medical evidence and specialist services that are likely to be needed to deal with a case.

The book concludes with invaluable contacts lists for expert assistance, training opportunities and many other resources for anyone beginning to learn about this issue, as well as those already working with FGM. More than anything else, it is a wake-up call that the issues are complex, and that the professional faced with a case on FGM needs to take a skilled, expert and holistic approach if clients and children are to be properly safeguarded.

\* Family law junior barrister of the year, 2014 Family Law Awards.

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