

DISCUSSION POINT

HOLIDAY PAY CALCULATIONS

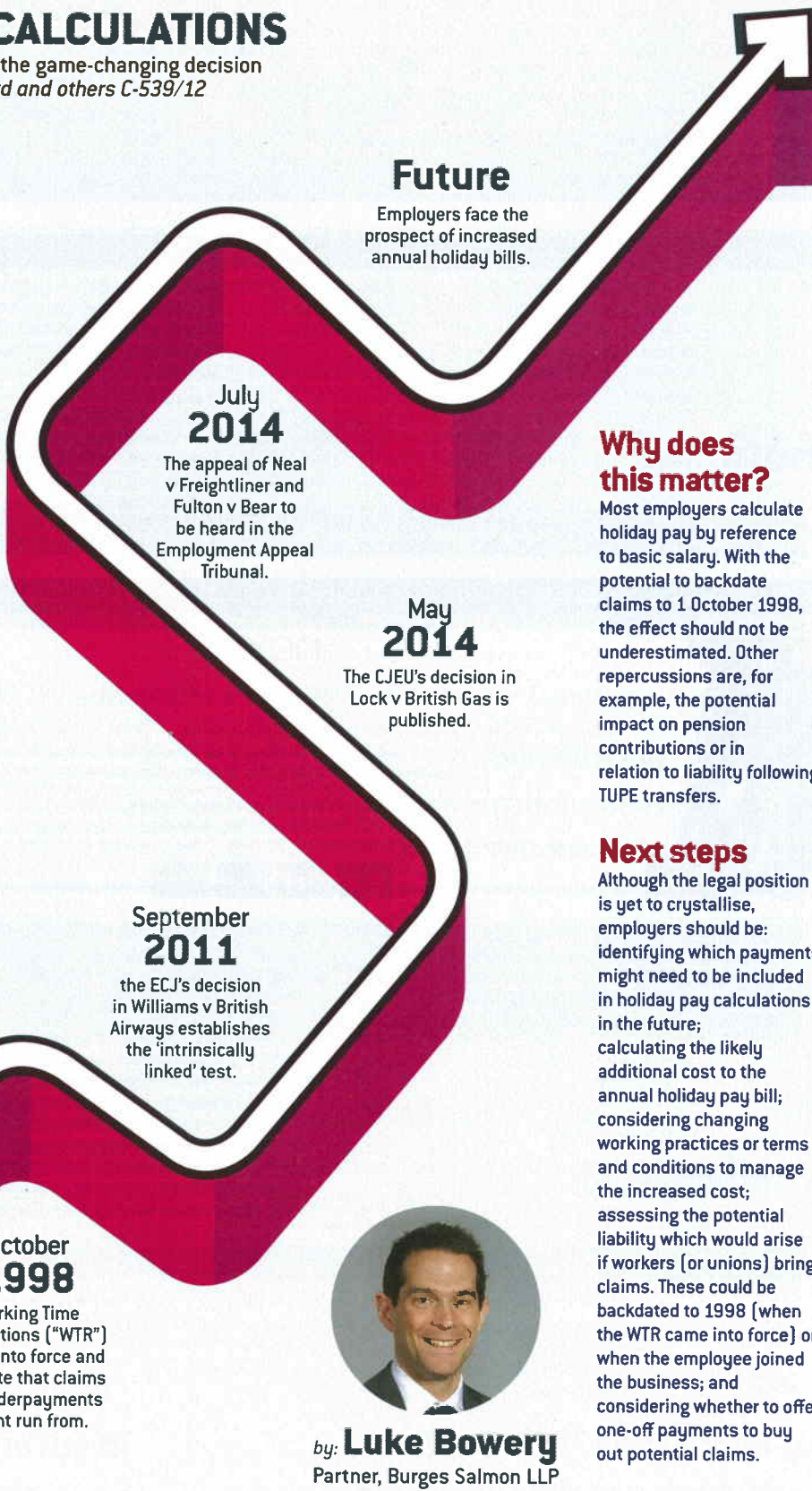
Reward looks at the impact of the game-changing decision in *Lock v British Gas Trading Ltd and others C-539/12*

The Lock case

In May, the Court of Justice of the European Union (CJEU) held that commission must be included when calculating a worker's holiday pay. As most employers do not include commission in their holiday pay, this decision will be an expensive, as well as an administrative nightmare because it means that workers may be able to bring substantial claims for this shortfall.

And it doesn't stop there...

The Lock decision expands on a CJEU principle that any payment that is 'intrinsically linked' to an employee's tasks under the employment contract should be included as part of holiday pay calculations. This means the decision is unlikely to be confined to commission. The cases of *Neal v Freightliner* and *Fulton v Bear* are on their way to the UK Employment Appeal Tribunal, where the issue of whether voluntary overtime should be included in holiday pay will be considered. The decision is likely to be a 'yes'.



Future

Employers face the prospect of increased annual holiday bills.

July 2014

The appeal of *Neal v Freightliner* and *Fulton v Bear* to be heard in the Employment Appeal Tribunal.

May 2014

The CJEU's decision in *Lock v British Gas* is published.

September 2011

the ECJ's decision in *Williams v British Airways* establishes the 'intrinsically linked' test.

October 1998

Working Time Regulations ("WTR") come into force and the date that claims for underpayments might run from.

Why does this matter?

Most employers calculate holiday pay by reference to basic salary. With the potential to backdate claims to 1 October 1998, the effect should not be underestimated. Other repercussions are, for example, the potential impact on pension contributions or in relation to liability following TUPE transfers.

Next steps

Although the legal position is yet to crystallise, employers should be: identifying which payments might need to be included in holiday pay calculations in the future; calculating the likely additional cost to the annual holiday pay bill; considering changing working practices or terms and conditions to manage the increased cost; assessing the potential liability which would arise if workers (or unions) bring claims. These could be backdated to 1998 (when the WTR came into force) or when the employee joined the business; and considering whether to offer one-off payments to buy out potential claims.



by: **Luke Bowery**
Partner, Burges Salmon LLP