

ENGLAND AND WALES / JUDGMENT

Heather Brady & Ors v North Lanarkshire Council & Ors

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BEFORETHE HONOURABLE LADY HALDANE
MRS MARGOT MCARTHUR ChFCIPD
DR GILLIAN SMITH MBE

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Brady and others v North Lanarkshire Council and others

Neutral Citation Number: [2025] EAT 69

EMPLOYMENT AP

PEAL TRIBUN

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Case No: EA-2023-SCO-000076-DT

52 Melville Street, Edinburgh EH3 7HF

Date: 15 May 2025

Before:THE HONOURABLE LADY HALDANE
MRS MARGOT MCARTHUR ChFCIPD
DR GILLIAN SMITH MBE**Between:**MS HEATHER BRADY & OTHERS
- and -
NORTH LANARKSHIRE COUNCIL & OTHERS
Appellant
Respondent-----
Ms Daphne Romney KC (instructed by DM Legal Claims Ltd.) for the Appellant
Mr Stephen Miller (Clyde & Co.) for the Respondent

Hearing dates: 11 & 12 December 2024

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others The Honourable Lady Haldane:

Introduction

1. This is an appeal against a Judgment of the Employment Tribunal sitting in Glasgow (EJ Doherty sitting with members Mr P O'Hagan and Mr J Burnett) dated 26th June 2023. That Judgment was preceded by 8 days of evidence held over a number of months between February and June 2023. 2. There are multiple claimants in this litigation, each presenting claims of equal value, as that term is construed in § 65(6) of the Equality Act 2010 ('EqA'). The claimants were represented by Ms Romney KC and the respondent by Mr Miller, solicitor advocate. The parties will be referred to as the claimants and the respondent, as they were before the ET. 3. The claims arise out of a number of job evaluations carried out by the respondent, in respect of a variety of posts within its organisation, and over a number of years. The ET had before it an agreed list of issues setting out seven issues for determination, but the overriding issue at the heart of the claims was summarised by the ET as being: did the ET have reasonable grounds to suspect that all or any of the comparator job evaluations are unreliable? In exploring that question, the claimants did not lead any evidence themselves. Evidence in chief was given by way of witness statements and seven witnesses were led for the respondents. 4. The conclusion of the ET was that in respect of the 2007 job evaluations of the posts of Gardener/Chargehand Gardener there were reasonable grounds to suspect that these are not suitable to be relied upon in terms of § 131(5) of the EqA. Similarly, the 2007 and 2009 job evaluations of the posts of Refuse Collector were not suitable to be relied upon either. However, in respect of job evaluations carried out in 2007 in respect of the post of Road Sweeper, the 2007 evaluation of the post of Labourer/Storeman, 2016 evaluations of the posts of Gardener NLC 3 and Gardener NLC 5, Refuse Collector and Road Sweeper, there were no reasonable grounds to suspect that these were not suitable to be relied upon. In similar vein, the same conclusion was reached in respect of the © EAT 2025 Page 2

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others 2019 evaluation of the post of Storeman. 5. The claimants challenge the Judgment of the ET in four grounds of appeal, as follows:

- a. Ground 1 - The ET erred in holding that the 'one bad apple' principle as explained in *Hartley v Northumbria NHS Foundation Trust* (ET Case No. 2507033/2007) should not be applied to the 2007 JES, so that there were reasonable grounds to suspect that all the comparator job evaluations under consideration were unreliable.
- b. Ground 2 - The ET erred in holding there were no reasonable grounds to suspect that the 2016 job re-evaluations for the Gardener NLC5, Chargehand Gardener, Street Sweeper and Refuse Collectors were unreliable.
- c. Ground 3 - The ET erred in holding that there were no reasonable grounds to suspect that the 2007 job evaluation for the Labourer/Storeman was unreliable in that it ignored (i) the absence of any other documentation supporting the reasons for the change of mark other than the minutes of the JESG in March 2007 (ii) the effect of the additional marks for Working Environment, which meant the jobholder was no longer a red and (iii) the Respondent's commitment to reduce the number of red circles and white circles, so as to keep low the costs of complying with Single Status.
- d. Ground 4 - The ET erred in holding that there were no reasonable grounds to suspect that the 2019 job evaluation for the Labourer/Storeman was unreliable.

Background

6. As is common in an Equal Pay case of this nature, the background to these claims involves a considerable number of claimants, and a series of Job Evaluation Schemes ('JES') carried out over a number of years. The JES in question were carried out on the basis of the Scottish Single Status Agreement 2009 (the 'Red book') which was not itself under challenge. The Judgment in the © EAT 2025 Page 3

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others present case runs, unsurprisingly, to 120 pages and 487 paragraphs. However the findings in fact in relation to the background leading up to the present challenges were not disputed by the parties, and so the panel draws upon those findings in narrating the factual background relevant to the matters that are the subject of this appeal. 7. The job evaluation exercise which was commenced in 2001 (hereafter the 2007 evaluation) took a number of years to complete and was implemented in April 2007. The 2007 evaluation involved jobholders completing a questionnaire in which they were asked among other things to provide examples from their job

of the type of factors which were evaluated under the scheme, factor by factor. A job analyst interviewed the job holder and made an assessment of each of the factor levels. Notes of interview were produced, and each analyst produced a job evaluation and job overview for the post which they had analysed. 8. As part of the job evaluation process a Job Evaluation Steering Group (JESG) was set up. There were a number of members of the JESG drawn from different departments across the respondent's organisation. Minutes were produced of meetings held by the JESG. The JESG reported to the Corporate Management Team (CMT). The JESG carried out its' work evaluating posts over a number of months and the respondent's workforce received notification of their points and grades under the evaluation exercise on 17th March 2006. The date of implementation of Single Status was April 2007, backdated to 6th November 2006. Upon implementation of job evaluation pay protection was put in place for a period of three years by 'red circling' posts which would otherwise have seen a drop in pay as a result of job evaluations from 6th November 2006. Posts which were 'white circled' remained at the same level of pay, and 'green circled' posts went up in pay as a result of the job evaluations. 9. Claims were lodged commencing in December 2005 by 4000 claimants which resulted in a Tribunal hearing conducted over 7 weeks from April 2013 to October 2014 (the 2013/2014 litigation). The case was listed for further hearing dates to hear further evidence, but negotiations then began and a settlement was announced on 19 March 2015 without any further hearings. Prior © EAT 2025 Page 4

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others to that settlement, between 21st December 2013 and 13th January 2014, the respondent conceded that the job evaluations of the Home Support Workers (HSW's), School Crossing Patrols (SCP) and Playground Supervisors were unreliable. As part of the settlement agreement, without admission of liability, it was agreed that the roles of the HSWs, SCPs and Playground Supervisors would be re- evaluated; and that the roles of the Refuse Collector and Gardeners 3 and 4, would be re-evaluated. 10. In about 2015 the respondent changed its grading boundaries for those at NLC3. Its position was that this was in response to the implementation of Living Wage, rather than as a response to the earlier litigation. The effect was to bring Road Sweepers into Grade NLC3. Further claims were brought from 2016 onwards. The earliest claims go back to 2011. At its heart, the claimants' case is that the job evaluations were manipulated and/or changed in order to ensure that the pay differential remained in place between women's jobs and men's jobs and/or to maintain male pay levels following the loss of bonus. This is denied by the respondents. 11. Parties agreed an extensive Joint Bundle and provided skeleton arguments. Ms Romney, both in writing and orally provided insightful and helpful submissions detailing the background to the present litigation and the process undertaken in the various JES, for which the panel were grateful. The applicable law 12. There was no real dispute between the parties as to the application of legal principles in a case of this kind, other than in relation to the applicability of the 'one bad apple principle' discussed in more detail below. 13. The relevant statutory provisions

are found in sections 131 (5) and (6) of the EqA (formerly Section 2A (2A) of the Equal Pay Act 1970 (EPA 1970)) which provide:

(5) Subsection (6) applies where—

(a) a question arises in the proceedings as to whether the work of one person (A) is of equal ©
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approved by the Court for handing down Brady and others v North Lanarkshire Council and others value to the work of another (B), and

(b) A's work and B's work have been given different values by a job evaluation study.

(6) The tribunal must determine that A's work is not of equal value to B's work unless it has reasonable grounds for suspecting that the evaluation contained in the study—

(a) was based on a system that discriminates because of sex, or

(b) is otherwise unreliable. 14. Parties were agreed before the ET, and did not depart from that position before the EAT, that the effect of the decisions in Russell v South Lanarkshire Council (ET Case No. S/107667/05 ET) and Brennan v City of Sunderland (ET Case No. 2503297/06) so far as the interpretation of section 2A(2A) is concerned is that sections 6(a) and (b) are alternative basis of reasonable grounds of suspicion. In the present case the contention is that the evaluations were 'otherwise unsuitable' in terms of subsection 6(b). 15. On the question of the applicable burden of proof, again parties were agreed that the proper approach is set out by Lord Menzies in Armstrong and others ("the HBJ claimants") v 15 Glasgow City Council; McDonald and others ("the Unison claimants") v Glasgow City Council [2017] IRLR 993 as follows: "It was accepted that the onus in this regard was on the claimants to raise this issue, but it was for the Tribunal to assess whether it had reasonable grounds for suspecting that the evaluation was unsuitable to be relied on. There is no requirement for 'cogent evidence' to show that the evaluation is definitely unsuitable to be relied upon – all that the tribunal requires is reasonable grounds to suspect this. The ET in the present case erred in requiring 'cogent evidence' from the claimants to show reasonable grounds for suspicion (see eg paragraphs 102, 353, 470 and 696). The ET placed a formal evidential burden upon the claimants to prove that the JES was not suitable to be relied upon, as a precondition of the ET considering whether there were any reasonable grounds. This set a threshold which was not required by EQP and was an error in law. Indeed, the ET appears to have required not just evidence from the claimants, but expert evidence on their behalf, to raise even a suspicion (see paragraphs 621 and 718, and paragraph 40 of the additional reasons). There is no requirement for particularly cogent evidence, nor indeed for © EAT 2025 Page 6

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others evidence that an element of the study is actually unsuitable. All that is required is reasonable grounds for suspicion.” 16. As for the approach I am to take to the ET’s decision, I keep in mind the guidance provided in DPP Law Ltd v Greenberg [2021] EWCA Civ 672: “58. ... where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should ... be slow to conclude that it has not applied those principles, and should generally only do so where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal’s mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. ...” The First Ground of Appeal – Did the ET err in failing to apply the ‘one bad apple’ principle to the 2007 JES 17. It is convenient to analyse and provide a determination in respect of each ground of appeal in turn. The first ground of appeal is directed towards the ET’s approach to what is known as the ‘one bad apple’ principle as first enunciated in Hartley v Northumbria NHS Trust (ET Case No. 2507033/07). Read short, that ‘principle’ is to the effect that where flawed and/or manipulated evaluations are identified which give reasonable grounds for suspecting deliberate acts of discrimination at the centre of the JES, then that gives rise to an inference that all of the evaluations are flawed. Ms Romney, who appeared in Hartley, candidly explained that this principle had thus far not received detailed treatment or approval at appellate level. She was equally candid in her overarching submission that this Tribunal should approve and apply the principle in the present case. 18. The ET’s findings on this aspect of matters are found at paragraphs 297 to 300 and are in the following terms: “297. What was said by the ET in Hartley was: ‘632. In practice, however, we think that Ms Romney and Ms Beale are right. If we have reasonable grounds for suspecting deliberate acts of © EAT 2025 Page 7

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others discrimination right at the centre of the JES, it is difficult to see how those suspicions could be limited to a particular evaluation or group of evaluations. If the members of JEWP were to recommend the adoption or withdrawal of a national profile for an improper motive, that would show bad faith on their part. If the members of JEWP were themselves to be manipulated by the “special pleading” of a particular interest group, that would not show bad faith on their part, but it would show a worrying lack of judgment and expertise (which could also extend to the parent bodies, the JSG or Executive) and the CNG (or Staff Council). We do therefore think that in

practice an all or nothing approach is required in relation to the serious allegations of manipulations of profiles and guidance which have been made by the claimants.'

298. Mr Miller argued that Hartley was concerned with the design of the scheme as opposed to its application and it was not possible to separate out principles from Hartley which might apply here.
299. The Tribunal was not persuaded that the conceded flaws in the evaluations of two comparator posts and the fact that there was no explanation for the drop in marks for the HSW, was a sufficient basis upon which it could conclude that there were reasonable grounds for suspecting that all the evaluations conducted by NLC in 2007 under the Red Book JES were not suitable to be relied upon. The scheme itself is not challenged, and unlike Hartley there is no allegation of manipulation of generic role profiles which would affect the application of the JES across the board, and potentially have the effect of rendering all the evaluations carried out under the scheme unsuitable to be relied upon. What the Tribunal is concerned with here is the individual evaluation of posts under a JES which itself not challenged.
300. The Tribunal does however have more in this case. The Hartley argument was the claimant's esto position. The Tribunal heard considerable evidence and submissions about the comparator posts challenged in addition to more general points about the evaluation exercises." Submissions for the claimants
19. Ms Romney argued that the findings of the ET set out at paragraph 299 (i) misunderstood § 131 (6) EqA 2010 (the successor provision to § 2A(2A) EPA 1970) (ii) misunderstood the ratio of Hartley, and (iii) misunderstood the facts of the case. She summarised the import of Hartley to be: – can one questionable valuation found to have been manipulated to achieve an outcome give rise to the inference that all of the others must be subject to reasonable suspicion? 20. In the present case, Ms Romney submitted that there were a number of marks which in certain cases were conceded, and others with no evidence put forward to support them and no © EAT 2025 Page 8

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others explanation given. Therefore, she argued, it was possible to see a pattern of certain scores being built up and female scores being knocked down in order to achieve a particular outcome. In such circumstances Ms Romney suggested that if it was not possible to trust how the JES had been carried out, and there had been 'clear manipulation' of five or six jobs, why would that not give rise to suspicion of the others? In concluding that the 'one bad apple' principle did not apply in the present case, Ms Romney contended that the ET had fallen into error because it had not pieced together all aspects of the case. 21. In amplifying that submission, Ms Romney contended that the bad apple test was one of the tests that ought to be applied in determining whether § 131

had been complied with. A mistake was permissible, but not if the employer had deliberately set out to subvert the scheme. This was where the ET had fallen into error, it had gone through matters piece by piece, rather than looking at the picture overall. She recognised that the respondent might argue that the language of § 131 required each evaluation to be looked at separately rather than the study or scheme as a whole, but she contended that such was too restrictive a reading – a purposive approach was required to give effect to the intention to achieve equal pay, therefore the widest possible effect had to be given to the wording rather than looking at each individual job evaluation. Therefore the question was not only is the mark in question clearly wrong, but what effect does that have in leading to that job evaluation being used as a comparator? These were questions which affected the inquiry as to whether there was ‘reasonable suspicion.’ Therefore whilst the ET was clearly entitled to reach a conclusion on that question, it was obliged to do so on all of the evidence available and not in a piecemeal fashion. 22. Therefore when one came to look at the ET’s conclusions in relation to Hartley (as set out above) it could be seen where it had fallen into error in paragraph 300 because of the impression left that the ET were going to look at all of the posts against the background of the ‘one bad apple’ principle, but had failed to do so. A second error in the same paragraph is the distinction drawn between the challenge to the scheme in Hartley, and the lack of challenge to the underlying Red

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others Book scheme in the present case, with an absence of allegation of manipulation of generic role profiles that would affect evaluations across the board. Such was a misunderstanding not only of Hartley, but of § 131. Certainly, Ms Romney accepted, Hartley was looking at the scheme itself but there was no difference in principle between a generic role profile and a local role profile because what had arisen was still manipulation.

23. More broadly, the point under challenge was the application of the process, although there was no challenge to the Red Book criteria. It was the manner of application of the Red Book that was being challenged. Put another way, if particular (female) jobs were being manipulated with the purpose of suppressing equal pay claims that was no different to manipulating job profiles in a generic way, as had been the argument in Hartley. Therefore the ET had misdirected itself at paragraph 299 and that was sufficient for the claimants to succeed on this point. Submissions for the respondent 24. For the respondent, Mr Miller submitted firstly that the decision in Hartley was not binding either on the ET or on the EAT and did not have the status of precedent which the claimants appeared to assert. In any event the facts of Hartley were distinguishable from the present case. In Hartley, the factual scenario involved national generic job profiles which had been devised for thousands of employees whose responsibilities would be matched at local level to national generic job profiles. In contrast the present case had emerged from a JES based on the Red Book which

itself represented a move away from pre-evaluated job profiles being handed down. That was significant when considering the submission made on behalf of the claimants that there was no material difference between generic job profiles being manipulated and local job profiles being undermined by manipulation. Such a submission was not supported by the analysis in Hartley, for example at paragraph 622: “622. The language of values, demands and headings which is used in subsection 2A(3) clearly limits the subsection to the factors and weighting contained in the factor plan. That language does not permit discrimination in other parts of the study to be considered under subsection 2A(2A)(a). The © EAT 2025 Page 10

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others language used in subsection (3) causes us to accept the submission by Mr Bowers and Mr Sweeney that “a system” discriminates on grounds of sex “where the difference between values is not justifiable irrespective of the sex of the person on whom the demands are made. Thus the subsection absolutely confines considerations of sex discrimination in job evaluation studies to consideration of the system (section 2A(2A)(a) makes this clear). The “system” sets the values on different demands. The system will be discriminatory if the difference between those values which have been set by the system are not justifiable irrespective of the sex of the person on whom the demands are made”. 25. This passage made clear that what was under consideration in Hartley was a ‘system’ or ‘scheme’, although it was clear that although Ms Romney’s submissions had not ultimately been accepted by the Hartley Tribunal, it has still accepted that discrimination could still be argued when the question of reliability was under consideration – that was the ‘entry point’ for the ‘bad apple’ test. 26. This was important context for what followed at paragraphs 630 and 631 in Hartley where the EJ dealt with the ‘bad apple’ point in the following way: “630. If we find reasonable grounds for suspicion that one particular evaluation or group of evaluations is unsuitable to be relied upon, must those reasonable grounds for suspicion extend to all evaluations under the JES? Mr Lynch and Mr Milford suggested in their written submissions that the claimants’ allegations do not require an “all or nothing” approach to the JES. There could be more limited grounds for suspicion if it were found that one or two profiles had been improperly revised upwards but that the rest of the profiles had been created in a non-discriminatory way. Ms Romney and Ms Beale, however, in their submissions contend that if they can show that job profiles and the factor guidance were “manipulated”, that must be sufficient in itself to provide reasonable grounds for suspecting that the JES as a whole is unsuitable to be relied upon. They also suggest that there is a subsection 1(5) point, because if there are reasonable grounds for suspecting inappropriate manipulation of any profiles, the scheme cannot be said to be thorough in analysis and capable of impartial application.

631. It seems to us that in theory Mr Lynch and Mr Milford are right. It may in theory be possible to have reasonable grounds for suspicion about the suitability of only one set of profiles or even one particular profile and to say that this is a subsection 2A(2A)(b) point, because malpractice in changing guidance or in relation to national profiles would go to the implementation of the study rather than the design of the study. Furthermore, once it has been found that the study as established satisfies a subsection 1(5) test, something more than reasonable grounds for suspicion would be required to show that it no longer satisfies that test.” © EAT 2025 Page 11

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27. Mr Miller submitted that what could be taken from those passages was that the EJ was saying no more and no less than that there are two ends of a spectrum, where at one end an evaluation can be deemed unreliable for whatever reason without any ‘knock on’ effects and at the other there can be deliberate discrimination at that heart of the scheme which taints the entire exercise. The specific example in Hartley was where a taint in a national evaluation could potentially affect 2000 employees up and down the country.
28. Mr Miller suggested that the EAT should be slow to give its imprimatur to the approach in Hartley when in reality what was in question was the application of a straightforward statutory test, namely was a particular job evaluation unreliable, or not. The implication of the outcome sought by the claimants was that what was in question in the present case was a challenge to the evaluations in respect of cooks, cleaners and carers but there had been over 300 job types in this particular JES. If the hypotheses that those charged with carrying out and implementing the JES had engaged in some kind of connivance had been accepted, why should job evaluations in respect of, for example planners, or lawyers, fall just because of some connivance in the grading of carers and cleaners? The effect would be that these other job evaluations would be extinguished until they were re- evaluated. Mr Miller suggested that it was not possible to discern a broad point of principle that would support the ‘bad apple’ theory in the case of local job evaluations such as the exercise in the present case. Put another way, the proposition was not so much that the ‘bad apple’ theory emerged from Hartley but that it should be confined to Hartley and the specific circumstances found to exist there. In summary the findings of the ET so far as Hartley is concerned were entirely open to it and no error of law had been demonstrated. Its findings were underpinned by sound reasoning and in particular in paragraphs 366 and 368 it had made permissible findings in fact concluding that no adverse inferences of manipulation could be drawn from the steps carried out by those charged with carrying out the JES. Ground 1 – analysis and decision © EAT 2025 Page 12

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others 29. The contention for the claimants is, in summary, (i) that the approach contended for in Hartley is of wider application than the specific circumstances of that case (ii) that despite not being bound (in a legal sense) to do so, the ET ought to have found that the ‘one bad apple’ theory was apposite in the circumstances of the present litigation and represented an appropriate, purposive construction of § 131, and (iii) that the EAT should in effect give an imprimatur of approval to the principle and conclude that the ET having declined to apply same, such amounted in effect to an error of law. 30. The context of Hartley was different to those of the present case. The JES in question was a national scheme, relevant to thousands of NHS posts. Here the scheme is a local scheme based on the (unchallenged) Scottish Single Status Agreement 1999 (the ‘Red Book’). Ms Romney suggests that distinction is immaterial for present purposes, rather the proper question is whether the identification of individual instances of manipulation or connivance suggest a taint that undermines the whole JES and thus reasonable grounds for suspicion that the JES is unreliable which is more consistent with a purposive or expansive construction of § 131. 31. The panel could not conclude that the distinction is immaterial, when one has regard to the possible consequences of the approach contended for by the claimants. It is not hard to appreciate the contention that a national JES which governs the evaluation of the roles of thousands of, say, nurses, which is demonstrably tainted by manipulation at its heart, gives rise to reasonable grounds for suspicion that the whole exercise is unreliable. The same cannot be said of a JES carried out on the basis of a scheme which is not itself said to be tainted by any such suspicion, rather certain evaluations carried out under that scheme are said to be so afflicted by manipulation or connivance such that they meet the statutory test of unreliability. The point Mr Miller makes in the context of the present cases is a powerful one – to follow the route suggested by the claimants and declare all of the local evaluations to be unreliable on the basis of a few ‘bad apples’ would have the potential consequence that the evaluations of many posts within the respondent’s organisation, many of which may not even have been the subject of challenge, would fall to be declared as unreliable and © EAT 2025 Page 13

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others have to await the next re-evaluation exercise before they could be looked at again. That, it respectfully seemed to the panel, is the antithesis of the straightforward interpretation of the statutory language in a context such as the present. 32. It follows that the factual, rather than legal, distinction drawn by the ET in respect of this argument was an entirely permissible one. The first ground of appeal accordingly fails. © EAT 2025 Page 14

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others The Second Ground of Appeal – The ET erred in holding that there were no reasonable grounds for suspicion that the re- evaluations for Gardeners, Refuse Collectors and Street Sweepers were unreliable Submissions for the claimants 33. As Ms Romney very properly recognised, an appellate Tribunal will not retry facts. However she predicated her argument on the contention that the ET erred in considering the evidence ‘piecemeal’ rather than considering whether the evidence as a whole constituted reasonable grounds for suspecting that the comparators evaluations were unreliable. 34. A key plank of Ms Romney’s criticism under this head focussed on what she argued was a lack of transparency in the process. This is an argument that was advanced on the claimants’ behalf before the ET. The key findings on credibility and reliability, having regard to the argument on lack of transparency are to be found at paragraphs 359 to 364 of the ET Judgment. They are expressed thus: “359. Ms Romney submitted transparency is an important element of any process involving possible sex discrimination. She submitted that after each consistency meeting the consensus changed, but it is not clear on what this change was based. There is no record of discussions resulting in the consensus reached. NLC had not produced the original Questionnaires, Question Traces and notes of interview with the sample jobholders. Ms Cunningham claimed that these were in storage and could not be located, which is wholly unlikely, and their absence is surprising. Ms Quigley told the ET that she and the other job analysts were asked not to keep notes of their discussions about individual factor levels. The Council knew that litigation might follow; why would it not keep the notes and make them available now?

360. The Tribunal did not have an evidential base on which to conclude that after every consistency meeting the consensus changed. Ms Cunningham produced consistency check matrices; it was apparent from the consistency check matrix and summary produced for Refuse Collectors upon which she was cross examined, that further information was deemed to be required which resulted in a further meeting, where consensus was reached. That was not the same as consensus being reached and then changed.

361. The Tribunal was satisfied on the evidence of the witnesses who were present at the consistency check meetings, that the basis on which consensus was reached was discussion among the team members who considered the © EAT 2025 Page 15

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from the Service if that was needed. The job overviews were agreed with the jobholders and management via the Discussion Summary Form process. In addition, the team had advice from Mr Brewster and from Ms Cunningham about the technicalities of the JES and would go back and look at the terms JES if they considered it necessary. They looked at each post and debated what level should be awarded against for each job factor level in the JES, assessing the post overall. It was Mr Brewster's evidence that the team debated the evaluations and some particular factor level choices at great length. He said that they could spend all day arguing about a mere three factors in one job.

362. There were multiple consistency meetings and the number of these meetings and nature of the debate and discussion which took place was such that the Tribunal drew no adverse inference from a failure to take notes. The credibility of the witness evidence allowed the Tribunal to reach the factual conclusions which it did about how the consistency meetings were conducted and the information which the team had before them.
363. The Tribunal did not draw any adverse inference from the fact that the analysts were asked not to keep notes; this it seemed to the tribunal that this was explained by the fact that it was not unreasonable for NLC to seek to avoid the process being discussed until it was completed in order to avoid employees seeking to influence the outcomes, as explained by Ms Quigley.
364. With regard to Ms Romney's submission about the failure to produce the original questionnaires, the Tribunal found Ms Cunningham to be a credible witness and it accepted her evidence that this material had been lost. The Tribunal had the Gauge outcomes which came from the questionnaire and interview process and there was nothing to suggest that these outcomes were in some way manufactured or had been tampered with to achieve a particular outcome."
35. Ms Romney cast doubt on the conclusions of the ET in this respect, contending that findings that the witnesses were credible and reliable did not 'trump' the need for documentation. Further and in any event the ET had looked at each aspect of scoring separately rather than as a whole. Ms Romney was equally critical of findings at paragraphs 387 to 389 to the effect that those involved in the later evaluations but who had also been involved with the evaluations that were the subject of earlier litigation had started this fresh exercise with a 'blank sheet'. Her position was that this was an improbable state of affairs, having regard to the 'prior knowledge' of these individuals as well as the presumed knowledge of others who had given evidence in the earlier litigation. The ET's conclusions on this matter as set out at paragraph 389 were in the following terms: © EAT 2025 Page 16

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others 'The Tribunal has however did not have any evidence from these individuals and the facts it is able to find as to their state of knowledge in 2016 on the basis that some of them were involved which began in 2001, or what information they had access to or what they discussed with whom, is significantly limited by this. Further the Tribunal had credible evidence from the witnesses as to the degree to which they were aware of the earlier equal pay litigation and their denial of having been influenced by other Trade Unionists. For the reasons set out above the Tribunal was satisfied that it was likely that some members of the team had some knowledge of Grades/Scores, however the Tribunal was satisfied that the evaluation process was a robust one and that the size and mixed management/TU make-up of the evaluation team was sufficient to ensure that the process was not manipulated. This meant that the process itself started from a blank sheet, as was intended.'

36. Ms Romney criticised the approach of the ET to the 'blank sheet' question as 'perverse' although her ground of appeal was not formally presented as one of perversity. She submitted that those marks for the comparators used from 2005-2009 which were obviously inappropriate were all reduced in the re-evaluation exercise, but that they 'conveniently' received higher marks elsewhere to maintain their marks overall, with the result that their pay did not go down. She cited examples in the categories of 'Responsibility for Others' in the Refuse Collector's evaluation and the 'Knowledge Factors' for Gardeners and Chargehand Gardeners amongst others, in support of this submission. Despite the ET stating that at paragraph 378 that it had had regard to this issue, Ms Romney nevertheless contended that it had failed properly to have regard to the effect and consequences of this point, and that had proper consideration been given to the matter, the ET would not have reached the overall conclusions that it did. The Respondents' submissions on ground 2
37. Mr Miller responded to the criticisms made by pointing out that the ET had heard evidence over 8 days, the vast bulk of which consisted of the claimants' cross examination of the respondent's witnesses. Against that background the conclusions reached by the ET, for example at paragraph 399, that there was not a sufficiency of evidence upon which to find that there were reasonable grounds to suspect the evaluation was not suitable to be relied upon, were properly reached on the facts as assessed by the Tribunal. He submitted that the approach of the ET to the © EAT 2025 Page 17

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others facts was underpinned by impeccable self-direction on the appropriate legal test to apply. He placed reliance also on the general conclusions found at paragraph 68 of the Judgment where the ET stated: '68. All members of the team had an equal say at the Consistency meetings in

reaching consensus on the job factors. No one member of the team was more significant than another, although some were more vocal. The size and breadth of the team meant that the discussions were not open to manipulation and were not manipulated by an individual or group of individuals.’ 38. This, Mr Miller submitted, as an important conclusion that overall disposed of any concerns that might be raised as to the underlying reliability of the evaluations under challenge. More broadly, the conclusions in relation to the evidence overall effectively precluded the challenge now brought. Paragraph 269 is to be found beneath a heading ‘Note of the evidence’ and is expressed thus: ‘269. It was a feature of this case that the Tribunal found all of the witnesses to be credible. The Tribunal was struck in particular by the importance the witnesses involved in the mini project attached to ensuring that that evaluation exercise was one which had integrity. The need for the process to be one which had integrity was repeated often by Ms Cunningham in her cross examination, and the Tribunal accepted that this was a significant driving force in the conduct of this exercise. It was put to Mr Cunningham that every time she took away a level from the evaluations carried out, she added she one. Ms Cunningham was categorical in her rejection of this position and was at pains to point out that every effort was made within the team to ensure fairness and consistency. Her evidence that the given number of analysts involved from across a range Departments and from management and Trade Unions, and the nature of the team discussions, there was no room for manipulation of the factor levels which were reached by a consensus, and the Tribunal accepted this. It is supported in this conclusion in that both Mr Brown and Ms Quigly expressed, in the Tribunal’s view, genuine surprise at the notion that the discussion process in the team about the appropriate level for job factors had been manipulated or that there was an agenda to ensure that a particular outcome favourable to the comparator posts was achieved. Both Mr Brown and Ms Quigley gave credible evidence to the effect that they did not have and did not access the information which would have allowed them to manipulate scores.’

39. Mr Miller submitted that, as had been the case in *Hartley*, the credibility of witnesses and their integrity were highly relevant matters to consider in the overall question of the reliability of the evaluations. In the present case, the ET had looked critically at the evidence based on what they © EAT 2025 Page 18

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approved by the Court for handing down *Brady and others v North Lanarkshire Council and others* had been asked to find or determine. Particularly where there was a lack of written records the determination of the central questions depended heavily on credibility. The ET had made entirely permissible findings that were open to it on the evidence and no perversity or other error of law had been demonstrated. Analysis and decision on ground 2 40. Essentially for the reasons advanced by Mr Miller, this ground of appeal does not succeed. The criticisms advanced by Ms Romney mirror to a large extent those advanced before the ET and upon which it has adjudicated, entirely permissibly, on the evidence before it. It has set out its findings on

credibility and reliability and why it did not conclude that there was any negative inference to be drawn from the lack of notes, as well as why it has accepted the evidence of those witnesses who spoke to beginning with a 'blank sheet' so far as the particular re-evaluations in question are concerned. This is an intrinsic part of its function as an 'industrial jury' and however well or sincerely held any doubts or suspicions as to the approach to marking might be, those do not ultimately permit an appellate Tribunal to hold that an error of law has been demonstrated, particularly in a case where, as Mr Miller observed, questions of credibility and reliability were particularly central to the question before the ET, and upon which it was uniquely well placed to adjudicate. The suggestion that the ET did not look at the matter holistically is not borne out by the conclusions set out above. The Third Ground of Appeal – Was the ET in error in holding that there were no reasonable grounds for suspecting that the 2007 evaluation for the Labourer/Storeman was unreliable? Submissions for the claimants 41. The central question for determination in relation to this evaluation centred on the change in mark for 'working environment' from level 1 to level 2 in 2007. The claimants challenged the © EAT 2025 Page 19

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others underlying premise for this change, predicated upon a requirement to work in the transport yard for a 'significant proportion' of the working day. The claimants challenged the evidential basis for the determination on the job evaluation and argued that the focus seemed to be more on increasing the jobholder's earning potential rather than ensuring the work was properly evaluated. 42. The ET considered these arguments, before reaching the following conclusions: '352. The Tribunal considered the claimants submission that the respondents seemed more concerned about increasing the jobholder's earning capacity, however the Tribunal considered that that was to read too much into a statement to the JESG explaining where the job would sit in terms of the NLC Grade boundaries and no significant weight could be attached to this.

353. It also considered Ms Romney's submission to the effect there was nothing to suggest the change in duties had been considered under the JES by a job analyst, or to indicate what the significantly more time in the yard actually meant, or why that resulted in the increase in exposure to mildly or disagreeable conditions.
354. The Tribunal did not have evidence about those matters, as the respondents led no evidence about the evaluation this job. The fact that the respondents did not lead evidence about the evaluation did not mean it can be found that there were reasonable grounds for suspicion that it was unsuitable to be relied upon, on the basis of what was purely the claimants submission on these points. Even though the burden of proof in not a heavy one, it still rests with the claimants and there have to be reasonable grounds for suspicion. It would have been open to the claimant to have called witnesses to speak to this evaluation, as it would for any of the challenged evaluations, but they chose not to.

355. The Tribunal also considered the factors referred to above from the 2007 process. Those were the conceded unreliability of the HDW and SCPs posts and that in 2005 NLC were concerned about the cost of implementation of Single Status. However these matters cannot be said to directly affect this job evaluation. The evaluation was carried out in 2007 as a result of what was said to be a change in the job, the post having been originally evaluated in 2003.
356. The Tribunal considered the evidence it had about this evaluation, but was not persuaded that the potential for inconsistency referred to above, and the inferences which could properly be drawn from the 2007 evaluation and the 2013 litigation were sufficient evidence upon which to find reasonable grounds for a suspicion that the evaluation of this job factor was not suitable to be relied upon.’ 43. The panel intend no disrespect to the eloquence of Ms Romney’s submission under this head when it concludes that it was essentially predicated upon the same criticisms of the approach of the © EAT 2025 Page 20

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others ET as had featured under the second ground of appeal, except under this head focussed on the approach to the scoring so far as the Labourer/Storeman evaluation in 2007 was concerned. The ET had once again failed to look at matters as a whole, and failed to give sufficient weight to the lack of documentary evidence as itself giving rise to grounds for reasonable suspicion that the job evaluation was unreliable. This lack of transparency was a factor that ought to have been considered by the ET. Ms Romney criticised the evidence given by various witnesses and submitted that an employer could withhold, destroy, or fail to maintain records and this would permit such an employer to defeat a claim brought under § 136(1) EqA which ‘could not be right.’ Submissions for the respondents

44. Mr Miller’s submission in respect of this ground of appeal was a focussed one. It was clear from the conclusions of the ET as set out above that they had taken the points made, and the evidence before it properly into account. The claimants had lost on the evidence, and only a perversity challenge could overcome this. The weight to be placed on the various adminicles of evidence was a matter squarely within the province of the ET. The ET was entitled to decline to draw the inference urged upon it by the claimants, who retained the evidential burden. Analysis and decision on the third ground of appeal 45. This ground, like those before it, is not presented as a perversity challenge. Nevertheless the contentions made have that ‘flavour.’ Were this an overt perversity challenge, it would not in any event have succeeded. There is nothing in the approach of the ET to the evidence before it that suggest that it reached a conclusion that no reasonable Tribunal could have reached on a proper appreciation of the evidence and the law. The claimants’ challenge is characterised as a failure on the part of the ET to properly evaluate all of the evidence before it. The claimants’ approach is akin to suggesting that on the evidence available there was only one possible

outcome. As can be seen however from the passages set out above, the ET did, on this aspect of matters, properly have regard to all of the evidence presented, and the submissions made, and reached a conclusion that © EAT 2025 Page 21

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others was open to it. No error of law arises from that approach and this ground too, accordingly fails. The Fourth Ground of Appeal – Was the ET in error in holding that there were no reasonable grounds for suspecting that the 2019 re-evaluation of the Labourer/ Storeman was unreliable? The claimants’ submissions

46. Many of the arguments presented under this ground mirrored, understandably, those made in respect of the second and third grounds of appeal. Ms Romney criticised the failure of the respondent to implement its own re-evaluation policy. Once again, a lack of notes was said to undermine the transparency of the process. Such evidence as there was, and which was accepted by the ET as setting out what the new job would be, was not evidence that was correct. Key findings from the ET in this respect were in the following terms: ‘477. The Tribunal applying an objective approach did not consider that it was unreasonable for Ms Hughes to accept that information uncritically from the Service. That is not the same as accepting uncritically that the Grade should be as the one the Service suggested should be applied to the post.
478. The Tribunal, again taking into account its industrial experience, did not consider that Ms Hughes could be criticised for conducting this evaluation on a paper basis, as the amended job did not yet exist at the point when she carried out the exercise. Nor did it consider much turned on that a lack of notes by Ms Hughes of conversations between her and Ms Graham, where she gave credible evidence as to what steps she took to evaluate the post.
479. Ms Romney suggested that the Service could have manipulated the job description in order to ensure an enhancement in the Grade. That of course may be so, but fact that a manager could inflate a demand does not mean that they have done so, or that there are reasonable grounds for suspecting that it has been done. It is conjecture to suggest that the increase in mental skills demands of the job was invented and unnecessary because the Storeperson is working with skilled Mechanics.’ Submissions for the Respondent
47. Mr Miller submitted that, once again, the ET had dealt with this issue in a way that was © EAT 2025 Page 22

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others plainly open to it on the facts and he commended the reasoning process as fully articulated, having regard to the findings set out above. In particular Mr Miller submitted that the finding at paragraph 278 effectively disposed of this particular ground of appeal. He pointed also to the findings at paragraphs 486 to 487 which are expressed thus: '486. On balance, taking into account Ms Hughes evidence as to the steps she took to re-evaluate to post and the information she based this on, the Tribunal did not conclude much could be drawn from the breaches of the Policy cited by Ms Romney.

487. The Tribunal was satisfied that the evaluation carried out by Ms Hughes could not be said to be unreasonable, and it was not satisfied that there was sufficient evidence upon which to conclude that there were reasonable grounds for suspecting that it was unreliable.' 48. In summary, Mr Miller submitted that this was a litigation where credibility was determinative. Had there been an adverse finding on credibility on any of these points that would have led to the claimants succeeding. The converse was however also inevitable. Analysis and decision on the fourth ground of appeal 49. The succinct proposition that this litigation turns essentially on findings of credibility and reliability so far as the question of whether or not there exists reasonable grounds for suspicion that the impugned evaluations are unreliable is a sound one. Much is made of the lack of documentation and consequent alleged lack of transparency in the process, as well as an overarching submission that the issues identified give rise to reasonable grounds to suspect manipulation at the heart of the process. These submissions were before the ET and it has, on each occasion, considered, analysed and disposed of the arguments in light of the evidence which it had before it, and which it accepted. Such findings would only realistically be challengeable on grounds of perversity, and such a challenge is not explicitly, or by implication and taking the submissions at their highest, made out. For all these reasons the second, third and fourth grounds of challenge do not succeed. Final decision and disposal © EAT 2025 Page 23

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approved by the Court for handing down Brady and others v North Lanarkshire Council and others 50. The first ground of appeal, based on an argument that the 'one bad apple' principle in Hartley should be applied, fails in consequence of the findings in fact made by the ET. It concluded that an 'all or nothing' approach, as it was described in Hartley at paragraph 632, was neither warranted nor required in the present case, particularly where no challenge was taken to the JES at the heart of the process. Those were conclusions permissibly open to the ET on the facts it found established, particularly where the ratio in Hartley was not binding upon it. Although that decision is no more binding on this Tribunal than it was on the one below, there has not in any event been identified an error of law whether emerging from Hartley or otherwise, that would justify interference with the conclusions of the ET on this matter. 51. In similar vein,

and for the reasons set out above, the remaining grounds of appeal seek to challenge or re-litigate findings in fact that were permissibly open to the ET in each case. Thus in the result, the appeal falls to be refused. © EAT 2025 Page 24

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Prepared on 23 October 2026 · Esheria