



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms D Dhungana

**Respondents:** (1) Mr R Rai  
(2) Mrs S Rai

## JUDGMENT FOLLOWING RECONSIDERATION

The claimant's application dated 16 February 2023 for reconsideration of the judgment dated 27 January 2023 and sent to the parties on 30 January 2023 is refused.

## REASONS

There is no reasonable prospect of the original decision being varied or revoked, because:

1. The Claimant says that her claim for marriage discrimination under s8 and s13 Equality Act 2010 should not have been struck out because there are core issues of disputed fact which will turn on oral evidence. Whilst there are many areas of disputed fact, serious allegations going both ways and a number of credibility issues, no part of my strike out judgment dated 27 January 2023 on this claim was based on an issue where there are core disputed facts between the parties. The decision on the Respondents' strike out application was made only on the narrow basis that the Claimant's marriage discrimination claim was structurally flawed because she had identified her husband Mr Basnet as her comparator and he too is married.
2. The Claimant now in effect seeks to amend her claim after the event, to change the comparator, in response to that identified flaw. I identified in my judgment (paras 8-10,13) the occasions when the Claimant identified Mr Basnet as her comparator, most recently at the hearing on 19 January 2023. It is likely to be very rarely in the interests of justice that a party be permitted to amend their claim to bring it on a new basis after a claim has been struck out on the old basis. That would be a paradigm example of 'the second bite at the cherry'. The Respondents are entitled to know the case against them, take the Claimant's case in the way she herself puts it (taking into account she has been represented by Counsel at this and previous hearings) and not be faced with a moving target whereby the Claimant is permitted to change a fundamental part of her claim when it

has already been struck out, to bring it on a different basis because the first basis didn't work in terms of the comparator required under the Equality Act 2010. In addition, in the light of the overriding objective in Rule 2, if that were permitted it would not be putting the parties on an equal footing as it would be favouring the Claimant at a significant detriment to the Respondents' ability to participate fairly in the claim, a claim that has now been ongoing since she presented her claim in September 2020, some 2½ years ago.

3. The Claimant attaches a (third) witness statement to her application but that is not fresh evidence but her way of seeking to bolster the changed basis of her claim to address the comparator problem. Whether the Polish couple were male or female (para 6) (an issue said to have arisen at the hearing on 20 January 2023) is not something new which affects the analysis because she had not previously identified one or both of them as her comparator and their gender is irrelevant.
4. It remains open to the Claimant to argue the relevance of the Polish couple in her sex discrimination claim in the way identified at para 19 of my judgment dated 27 January 2023.
5. The Claimant also asks in her reconsideration request for specific disclosure regarding the Polish couple. I have made Orders regarding disclosure and if the Claimant thinks there are documents missing when the Respondents provide theirs to her she can make an application for specific disclosure at that stage identifying why documents about them are relevant to the issues.
6. The Claimant also asks for a witness order in respect of the Second Respondent. She should first ask the Respondents' solicitors whether the Second Respondent will be attending voluntarily in any event. If the answer is no, she can consider whether to apply for a witness order.

**Employment Judge Reid  
Dated: 21 February 2023**