EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
MS ILKAY CETIN		(1) MRS MELANIE GRIFFITHS; (2) MR STEPHEN GRIFFITHS

Heard at: London Central, by CVP

On: 13 to 16 June, 2022.

Before: Employment Judge O Segal QC
Members: Mr David Clay; Ms Susan Aslett

Representations
For the Claimant: In person
For the Respondent: Mr Paul Wilson, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The claim of victimisation pursuant to ss. 27 Equality Act 2010 succeeds in one respect against the First Respondent, being the oral report made by her to the police concerning the Claimant in about late August 2018.

(2) The Claimant's other claims under the Equality Act, including the other claims of victimisation and those of race discrimination and harassment, and her claims of having suffered a detriment because she had made a protected disclosure, fail and are dismissed.

(3) In respect of her successful claim, the Claimant is awarded the sum of £7,000, inclusive of interest, by way of injury to feelings.

REASONS

1. The Claimant (C) is Kurdish, born in Turkey, and a British citizen. She brought various claims based on alleged acts by her previous employers, the Respondents (Rs) (who I shall refer to as MG and SG), for whom she worked as a live-in nanny for about five months ending with her resignation with effect from early May 2018.

Evidence

2. We had two bundles of documents, which for convenience we referred to at the hearing as the Respondents' and the Claimant's bundles.

3. We had witness statements and heard live oral evidence from:

   3.1.the Claimant;

   3.2.Mrs Griffiths.

Procedural matters

4. At the outset of the hearing, C raised the fact that she had recently applied for witness orders, which had been refused. C explained that the witnesses she had wanted to be ordered to attend could, she hoped, refute assertions made in MG's witness statement concerning factual details about C's employment history before she worked for Rs.

5. The tribunal explained that: (a) it was most unlikely that those factual matters would need to be considered and determined by us in order to adjudicate the issues we had to resolve (see below); (b) it was in any event in practice almost impossible to ensure witness attendance under order over the first two or three days of the hearing (the intention was to conclude the evidence by the end of the second day).

Litigation background and the issues that required determination

6. It is even more than usually important in this case to explain the litigation background and to identify by reference to that, what the issues are (and what they are not) which required determination by us.

7. On 29 May 2018 C issued the 'First Claim' against Rs. She ticked the boxes on the ET1 for unfair dismissal and relating to money owed in respect of her wages. In the 'details of complaint' section, C described her employment as the 'hardest' including being subject to MG making *'degrading comments about me. She made comments which I consider to be racist in nature'*. C alleged that MG had been *'very demanding, extremely controlling and manipulative in all aspects of my life during my employment.'* After addressing the narrowly financial aspects of her claim, C also asserted that she had *been 'deceived and exploited … not too far off from a type of slavery.'*

8. In the event (for reasons that are not relevant here), the only claim that was listed and determined was in relation to whether C had been paid the national minimum wage. Importantly, there was no substantive determination of any claim under the Equality Act.

9. C succeeded in her claim that she had not been paid the national minimum wage, being awarded just under £300. Subsequently, C obtained a modest award of costs on the basis that Rs had conducted themselves unreasonably in their conduct of the litigation by obtaining 'references' about C during the litigation on the false basis (at least implied) that Rs were thinking of employing her, in order to use the information obtained to discredit C during the litigation.

10. There were various applications made by the parties for reconsideration of the tribunal judgments and applications to appeal those judgments. Of these the relevant one for present purposes is an application on behalf of Rs made on 1 November 2019 to the tribunal to reconsider its judgment awarding C some costs. As part of that document the following statements were made: *"The respondents feared that perhaps things had been mis-conveyed to them during the recruitment process and their only concern was for the safety of their children. They talked to the Police who confirmed that their concerns were legitimate and they needed to put safeguarding measures in place for their children"*.

11. C presented the present claim on 21 January 2020. The ET1 said claims were being made of unfair dismissal, race discrimination and other claim(s). The particulars of claim set out in considerable detail allegations about the period of her employment

with Rs and about behaviour of Rs during the litigation of the First Claim and more generally following the termination of C's employment with Rs in May 2018.

12. Included amongst those allegations was that MG had 'complained' to the police about C and had (MG had said) been told by the police that they would have advised Rs not to employ C had they been asked about that before Rs did in fact decide to employ her.

13. It is very important to emphasise that at a contested OPH on 10 June 2021 the tribunal decided that it did not have jurisdiction to hear (and therefore struck out) all claims **except C's complaints of race discrimination, harassment, victimisation and protected disclosure detriment regarding Rs reporting C to the police**.

14. At a further case management PH on 22 July 2021 a List of Issues was determined. In respect of each legal ground of complaint (discrimination, harassment, victimisation and protected disclosure detriment), the detriment/treatment complained of was defined as being *"The respondents reported the claimant to the police on up to four occasions for the purpose of or with the result of negatively influencing any DBS check carried out in relation to her, the first report being on 7 August 2018, being the date the respondents were notified that the claimant was bringing a claim against them in relation to the minimum wage and other matters"*.

15. It is common ground that, in effect, C was permitted to amend the present claim to add complaints about MG reporting her to the police on occasions during 2020 which post-dated the ET1 form.

16. However, the majority of the evidence (documentary and witness statements) produced by both parties to the tribunal, was not directly relevant to the claims identified as proceeding by the tribunal on 10 June 2021 and as clarified in the List of Issues on 22 July 2021. Instead, both parties attempted by their evidence to demonstrate in as much detail as they could muster the supposed unreliability and bad faith of the other party. It could be said, in theory, that some of that evidence would be potentially relevant to issues of credibility which might assist the tribunal in resolving the actual claims before it. However, C's credibility was barely relevant if at all to those claims; and as to MG's credibility, in practice those claims turned solely on:

16.1. The content of communications between MG and the police which were either contemporaneously documented and/or in respect of which there was little or no dispute; and

16.2. The subjective reasons in MG's mind for making those communications, which were either obvious from the content and context of the communications, or could be inferred from that content and context.

17. Put shortly, the large majority of the evidence of the parties was not relevant to the claims/issues we had to determine.

Facts

18. We confine our factual findings to those matters that are relevant to our determinations.

19. C worked as Rs' live-in nanny, looking after their (then) two very young children between 4/12/17 and 2/5/18 (returning, as requested by Rs, for two further days in May about a week later).

20. Before the appointment was agreed, C provided Rs with a written CV. She told Rs that because of the circumstances of her leaving her last employment as a nanny for Mr X and his partner she could not get a reference from them. Rs accepted that explanation at the time and did not seek any other references. C also showed Rs a current DBS Certificate; Rs did not request a copy and C did not offer one.

21. During the period of her employment Rs believed that it was going well, based on their interactions with C, on their observation of the good relationships C built with their two children, and on the basis of the friendly tone of their communications with C, including a substantial record of written WhatsApp messages which were in the tribunal bundle.

22. C, however, harboured concerns and resentments against some of Rs' behaviour and speech to her, as graphically demonstrated by a further set of WhatsApp messages between C and her niece. C told us that she believed Rs would have been to some extent aware of her discontent at the time, though accepted that she had generally acted and spoken with kindness, not wanting to invite confrontation.

23. We accepted MG's evidence, supported by all the written documents both during and immediately after the appointment ended, that she and SG had no idea that C felt that they had not treated her well. Amongst other things, the tone of the WhatsApp messages around early May 2018, the fact that Rs asked C to return to look after their children for two days after her resignation had taken effect, the fact that they invited her to stay in touch with the children (which would have necessarily been through Rs, given the age of the children), and the fact that Rs recommended C to a friend, all pointed to that obvious conclusion.

24. As set out above, not long after the employment ended, C put in the First Claim, making the most serious allegations about Rs' treatment of her throughout that employment. Although most of those allegations have never been substantively adjudicated (and we make no finding as to whether any of them was accurate), Rs were unsurprisingly shocked and hurt when they found out (on about 2 August 2018, on receipt of the claim) that they had been made, and that their impression of their relationship with C had been so different from the way C described it in the First Claim.

25. MG reacted in part by pursuing various inquiries about C. Those fell into two categories (at least in so far as was in evidence before us).

26. First, as set out above, she sought to obtain 'references' from those listed in C's CV as her former employers and educational establishments. These are not directly relevant to this claim, but the following matters are of some significance:

    26.1. MG was able, with some effort, to make contact with C's last employers, Mr X and his partner. Mr X told MG, on or perhaps just before confirming it in an email dated 23/9/18 from Mr X to MG, that his experience of C had been a bad one, including that C had without good reason reported them in 2017 to social services for potential child abuse. C told us she had made a report to the NSPCC, who themselves contacted social services, and that she did so for good reason. We do not need to make and do not make any finding on that point. C's report to either NSPCC or Social Services is the protected disclosure relied on by C in this claim.

26.2. MG believed she had discovered at least two further anomalies in C's CV. C denies there were any false statements made in the CV she provided to Rs. We do not need to and do not make any findings on that point.

27. Secondly, MG called the police in probably late August 2018. The content of that call (or calls, MG could not be sure whether there had been a single call or whether she had been called back in response to her initial call) is important. We only have MG's evidence on this matter, which we accept. MG dialled the police on the non-urgent line. She asked whether it was possible for her to confirm the status of an ex-employee's DBS Certificate and was told it was not. MG then told the police that the person she was concerned about was C and she had reason to be doubtful whether C had in fact been an appropriate person to look after her children. Either in that call or in a subsequent call, the police told MG that in effect there was some question mark over C and that had MG contacted them before employing C to look after their children, they would have advised against it. The tribunal observes that we are surprised and concerned that the police would offer such 'advice' in that informal and unevidenced way.

28. As set out above, C only found out about this contact with the police on 1 November 2019 and put in the present claim on 21 January 2020, complaining inter alia about that.

29. On about 15 January 2020, C set up a website, on which she posted various material, including about child abuse, as well as about the litigation between herself and Rs (including links to the public documents in that litigation). Different posts were put up and taken down at various times. C said that the purpose of posts in relation to Rs was to protect herself against the false allegations Rs had made against her. C ensured that the full names of both Rs (in MG's case, her maiden name, which she still used and still uses where that is convenient, for instance in some professional contexts) appeared multiple times on the website. The full names of each Respondent (Melanie Mareuge-Lejeune and Stephen Derwent Griffiths) are unusual if not unique. This meant that anybody doing an internet search of those names would be immediately directed to C's website. It is difficult to resist the inference that this was C's intention.

30. MG found out about the website shortly after it was created, when searching on her own name. She and SG were very concerned that third parties, who might be expected to search the internet against their names, eg if considering employing one of them, would find themselves directed to C's website and associated with postings about child abuse and the ongoing and increasingly bitter litigation.

31. On about 19 February 2020, MG contacted the police to raise concerns that C had made false statements in the CV she supplied to Rs (as referred to in para 26 above). There is no contemporaneous record of that communication available to the ET, but MG told the tribunal that the police told her to make a report to ActionFraud, which she did on 19 February 2020, as referred to by MG in an email to the police dated 29 November 2020.

32. On 15 May 2020, MG made a report to the police by completing an on-line form, a copy of which was in the hearing bundles. That records, materially:

    32.1. An alleged offence committed in the period from 15/1/20 (the date C began her website) and ongoing.

    32.2. MG wrote that Rs had received the First Claim, which she described as being for *"unfair dismissal, unlawful deductions to wages, racism, discrimination, emotional torture & slavery"*; that C had since made various other allegations against them during the course of proceedings; that C had now brought the present claim; and that in January 2020 they became aware of C's website, about which MG records considerable detail both as to its content and how that has been/is damaging to her and SG.

    32.3. On 16/5/20, the police recorded that what had been disclosed by MG constituted a 'civil dispute' and 'This should be a no crime and closed'. That characterisation was reviewed on 22/5/20, when the file was kept open on the basis of potential harassment

    32.4. On 26/5/20 the file was closed on the basis of the allegation being false and/or there being no evidence of an offence; dismissing the possibility of criminal harassment on the basis that 'suspect is not actually making contact with victim'.

33. MG told us in evidence, and we accept, that her reason for making this report to the police was to get them to require C to stop using her website to link Rs' names with posts about child abuse, etc, on the basis that she considered such conduct to amount to harassment of them by C.

34. We accept that evidence (and reject C's alternative potential reason for MG making that report as being the First Claim) because:-

    34.1. The report was made some 21 months after Rs were sent the First Claim;

    34.2. The 'offence date' (see above) is clearly tied to the existence of the website; and

    34.3. The balance of the matters complained of by MG in the online form concern the website, albeit there is some detail given about the First Claim.

35. Some time later, on 8 November 2020, an email was sent from an unknown address to SG's employer, containing links to the judgments etc in the litigation between the parties, obviously designed to embarrass and/or cause harm to SG. C did not admit causing this email to be sent, but refused to answer questions about who did send it. Given that refusal, and in any event, we find that C caused that email to be sent.

36. Later in November 2020, MG initiated further communications with the police, which prompted PC Cartwright to write to C by email dated 27/11/20 to say that the police had been contacted regarding content posted by C on her website, in the hope that C could be persuaded not to post further such content (MG was not named in the email). The email stated that the report was presently closed, but that if C's behaviour were to continue, that might require investigation and potentially arrest for the offence of harassment.

37. C told us that when she subsequently spoke to the police, they told her in effect that MG's frequent requests of them to do something had in effect caused them to write that email to mollify MG.

38. It certainly appears that the police told MG the email had been written, since the following day, 28/11/20, MG wrote to the police thanking them for letting her know, asking them if any action could be taken against C for having made

'misrepresentations' in her CV and/or whether the police could link that with the website postings by C in a case against her.

39. MG told us in evidence that the purpose of the report(s) to the police in November 2020 was to get them to require C to stop using her website to link Rs' names with posts about child abuse, etc, on the basis that she considered such conduct to amount to harassment of them by C, and in part because of the email sent to SG's employer on 8/11/20 (referred to above). We accept that evidence, which is entirely consistent with the contemporaneous documents we have referred to above, as with the chronology of events. We reject, for those reasons, that MG made the reports in November 2020 because of the First Claim.

The Law

40. There was no dispute, and almost no discussion, as to the relevant principles of law.

Direct discrimination

41. As to the claims of direct discrimination, s. 13 EqA 2010 (the Act) provides that

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

42. Section 136 of the Act provides, as to the burden of proof, that

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

43. Although the two-stage analysis of whether there was less favourable treatment followed by the reason for the treatment can be helpful, as Lord Nicholls explained in Shamoon at [8], there is essentially a single question: *"did the claimant, on the proscribed ground, receive less favourable treatment than others?"*

44. A claimant does not have to show that the protected characteristic was the sole reason for the decision; *"if racial grounds or protected acts had a significant influence on the outcome, discrimination is made out"*: Nagarajan v London Regional Transport [2000] 1 AC 501 at pp512-513. The discriminator may have acted consciously or subconsciously: Nagarajan at p522.

45. We refer to well-known remarks of Mummery LJ in Madarassy v Nomura International Plc [2007] ICR 867, [56-58] on the burden of proof issue, albeit in the context of a claim that the claimant had been treated less favourably than actual comparators: that for stage 1 of the burden of proof provisions to be met, what is required is that *"a reasonable tribunal could properly conclude"* from all the evidence, that discrimination occurred.

Victimisation

46. Section 27 of the Act provides:

> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
>
> *(a) B does a protected act, …*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
>
> *…*
>
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

47. Section 136 (reversal of the burden of proof) applies to victimisation claims: Greater Manchester Police v Bailey [2017] EWCA Civ 425.

48. As in a discrimination claim (see above), the claimant must show that the protected act was a significant influence, or an effective cause of the detriment complained of. She does not have to show that it was the sole or main cause.

49. In Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, [2001] ICR 1065, a greater distinction was drawn between the 'but for' test and that which should be applied in employment discrimination cases. Lord Nicholls considered that the test (at least in the context of victimisation) must be: what was the reason why the alleged discriminator acted as they did? What, consciously or unconsciously, was their reason? Looked at as a question of causation, 'but for …' was an objective test; but the anti-discrimination legislation required something different. The test should be subjective: *"Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."*

50. In the same case, Lord Hoffmann, addressing the argument that a respondent might raise that it would have acted in the same way even if the claimant had done a similar act to the protected act but which would not have constituted a protected act, said this:

> ***49*** *The purpose of the statute is that a person should not be victimised because he has done the protected act. It seems to me no answer to say that he would equally have been victimised if he had done some other act and that doing such an act should therefore be attributed to the hypothetical "other persons" with whom the person victimised is being compared. Otherwise the employer could escape liability by showing that his regular practice was to victimise anyone who did a class of acts which included but was not confined to the protected act.*
>
> ***50*** *The requirement that doing the protected act must have been the reason for the less favourable treatment is adequate to safeguard an employer who acted for a different and legitimate reason. On the other hand, it will rightly provide no defence for an employer who can only say that, although his reason was indeed the doing of the protected act, it formed part of a larger class of acts to which he would have responded in the same way. …*
>
> ***60*** *A test which is likely in most cases to give the right answer is to ask whether the employer would have refused the request if the litigation had been concluded, whatever the outcome. If the answer is no, it will usually follow that the reason for refusal was the existence of the proceedings and not the fact that the employee had commenced them. On the other hand, if the fact that the employee had commenced proceedings under the Act was a real reason why he received less favourable treatment, it is no answer that the employer would have behaved in the same way to an employee who had done some non-protected act, such as commencing proceedings otherwise than under the Act.*

Harassment

51. As to harassment, s. 26 of the Act provides:

> *(1) A person (A) harasses another (B) if—*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

52. The *"related to"* test is broader than the *"because of"* test in s. 13. However, ss Underhill LJ explained in Unite the Union v Nailard [2018] IRLR 730 at [108]-[109], the tribunal is required to make findings as the motivations and thought processes of the individual decision-makers as to whether their actions were 'related to' the protected characteristic.

Protected disclosure

53. On the basis of our factual findings, and as explained further below, we did not need to consider the law in relation to protected disclosures.

Discussion

52. Both parties provided detailed oral submissions on day three of the hearing, for which we were grateful. We have taken those fully into account and refer to them as appropriate.

53. Given the limited nature of the issues we have to resolve, we are able, having found the material facts, to reach the following conclusions without difficulty (applying the law as set out above).

54. Each of the reports made to the police by MG (August 2018, February, May and November 2020) constituted detriments to C.

55. In particular, we reject Mr Wilson's submission that the August 2018 report did not constitute a detriment because C only found out about it some time later, by which time it formed only a 'small part' of what she was complaining about in Rs' conduct. The fact is, learning that this report had been made to the police did cause C significant concern, unsurprisingly, and she complained about it as part of the present claim (see further below).

56. As to the subjective reasons of MG for making those reports, we have found the primary material facts as set out above.

The August 2018 report

57. It was an effective cause (indeed the sole or main cause) of MG making the report in August 2018 that C had put in the First Claim, which MG found out about a matter of a few weeks at most before she contacted the police.

58. There is no basis for believing that the reason for MG making that report was because of or related to C's race. We consider that no reasonable tribunal could conclude that MG would have made any different report on that occasion had C's race been, say, white British or French.

59. Nor is there any basis for believing that C's protected disclosure – about which MG almost certainly did not know at the time she made the report – influenced MG to make this report to the police.

60. In relation to the victimisation claim, as Mr Wilson submitted, the tribunal have to go on to consider whether the protected act – being *bringing proceedings under this Act* and/or *making an allegation (whether or not express) that A or another person has contravened this Act* – was an effective cause of MG making the August 2018 report to the police.

61. We find that it was, for the following reasons in brief:-

61.1. On a natural (objective) reading of the details of complaint in the First Claim, in particular the various words/phrases quoted at paragraph 7 above, it seemed to us that C was alleging that Rs had treated her badly because of her race or for reasons relating to her race. That of itself does not require a finding that MG (subjectively) understood the details of complaint in that way; but it does suggest that, in the absence of cogent evidence to the contrary, she likely did so.

61.2. When MG herself summarised the allegations in the First Claim, when writing the police report in May 2020, having recorded the relatively less significant claims of underpayment of wages and unfair dismissal (the latter of which, by then, it had been established could not be pursued because of C's short service), she wrote that those allegations were of *"racism, discrimination, emotional torture & slavery"*. That makes it almost certain that an effective cause of MG taking the actions she did in investigating C's CV and contacting the police in August 2018 was those allegations of 'racism, discrimination', etc. It was those allegations (not those of underpayment of wages and unfair dismissal) to which MG often referred in her evidence to us as revealing a very different person to the one she believed she had got to know as her nanny. Those allegations were a large part of the 'reason why' MG contacted the police in August 2018.

The 2020 reports to the police

62. As set out in our findings of fact, the reasons why MG made the later reports were:

62.1. The February report was made because of the discrepancies MG thought she had discovered in C's CV; not because of or related to C's race or because of the protected disclosure.

62.2. The May and November reports were made because of Rs' concern about the contents of C's website, and in the latter case in part because of the email sent to SG's employer on 8/11/20; again not because of or related to C's race or because of the protected disclosure.

63. We consider that no reasonable tribunal could conclude that MG would have made any different report on any of these occasions had C's race been, say, white British or French.

Remedy

80. The tribunal adjourned the issue of remedy at the end of day three of the hearing (3 pm) until 11.00 am on day four. Having explained the relevant potential areas of factual inquiry, it was agreed that C would provide a short additional statement by 10.00 am and then give any further oral evidence on remedy at 11.00 am.

81. C helpfully provided a written statement, which made it clear that in the circumstances – including her desire not to disclose certain documents and information to Rs – she was only seeking an award for injury to feelings. C confirmed that position orally when giving evidence on day four.

82. The tribunal and Mr Wilson asked questions of C in relation to her claim for injury to feelings. We summarise the relevant evidence given by C, which we accepted (and which was not substantively challenged):

    82.1. Initially, when been told in November 2019 that Rs had made the August 2018 report to the police, C had thought that so 'extreme' she had not believed it. When she realised it was true she was shocked and worried – she 'felt awful'.

    82.2. C approached the police to attempt to discover what MG has told them about her, but she was not given any clear answer save that the police suggested that MG had been gathering evidence to assist their defence in the First Claim.

    82.3. C had subsequently applied for various jobs, including two with the police and one as an interpreter with the civil service. She was surprised not to get those jobs, for which she considered herself well qualified, and was concerned this was because of what MG had told the police about her.

    82.4. A significant reason why she put in the present claim was to complain about MG's report to the police about her.

83. Mr Wilson submitted that an award should be made at or near the bottom of the lower Vento band (£900) on the basis that, in context, learning of the 2018 report to the police had been a 'temporary blow' amongst other more significant issues for C, which could not be disentangled from that wider background. After the 'initial shock', he suggested, it formed a 'small part of a bigger picture'.

84. C did not accept this characterisation. She submitted that by MG reporting her to the police on the basis that C might not be an appropriate person to look after children, she was made to feel that the 'core of her personality and values' had been attacked as the result of her First Claim.

85. On the basis of C's evidence, as set out above, we are persuaded that this detriment was more substantial than Mr Wilson submitted it to be. Whilst a 'one off' event, it caused considerable shock and upset initially and an ongoing sense of concern in relation to future employment prospects, albeit that the latter concern became based on other matters also including the 2020 police reports made by MG.

86. In the circumstances, the tribunal concluded that an award in the upper part of the lower Vento band was appropriate, and fixed that in the sum of £7,000 including interest to date.

Oliver Segal QC

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Employment Judge

23 June, 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

23/06/2022..