

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2022] NZERA 338
3149341

BETWEEN	JAQUELINE HAVEA Applicant
AND	NXP HOLDINGS LIMITED First Respondent
AND	NXP LIMITED Second Respondent

Member of Authority: Nicola Craig

Representatives: Mohammad Shabani, counsel for the applicant
Hannah King and Bonnie Simmonds, counsel for the respondents

Investigation Meeting: 1 April 2022 in person and 14 April 2022 by audio-visual link

Submissions [and further Information] Received: 14, 19 and 20 April 2022 from the applicant
14 and 21 April 2022 from the respondents

Date of Determination: 21 July 2022

DETERMINATION OF THE AUTHORITY

- A. Jaqueline Havea was employed by NXP Limited.**
- B. Ms Havea was unjustifiably disadvantaged by NXP Limited regarding a performance improvement plan but no remedy is awarded.**
- C. Ms Havea's dismissal claim is not established.**
- D. Costs are reserved and a timetable set.**

What is the Employment Relationship Problem?

[1] Jacqueline (Jackie) Havea was a Customer Service Professional at a customer support call centre involved in providing NXP stationary, office and other supplies, including personal protective equipment.

[2] Ms Havea finished work in March 2021 and claims she was told she had to go. By contrast NXP Limited (NXP or the company) asserts Ms Havea freely tendered her resignation.

How did the Authority investigate?

[3] After the claim was initially lodged by Ms Havea against NXP Holdings Limited (NXP Holdings) a question arose about whether Ms Havea had been employed by that company or by NXP Limited (NXP or the company). With agreement from the parties, NXP Limited was joined as second respondent and the question about the identity of Ms Havea's employer added to the list of issues to be investigated.

[4] An investigation meeting was held on 1 April 2022 and evidence heard from Ms Havea, Ms Havea's niece/support person, NXP's Head of Customer Experience Taylia McCall and General Manager of Human Resources Anna-Marie Su'a. Submissions were heard on 14 April with additional material and comments provided later by the parties.

[5] All material from the parties was fully considered. However, as permitted by s 174E of the Employment Relations Act 2000 (the Act), this determination has not recorded everything received from the parties but has stated findings of fact and law, expressed conclusions and specified orders made as a result.

What are the issues?

[6] The claims to be investigated are:

- (a) Who was Ms Havea's employer?
- (b) Was Ms Havea disadvantaged by unjustified actions of her employer?
- (c) Was Ms Havea dismissed and if so, was that unjustified?
- (d) Was Ms Havea discriminated against due to her age?

- (e) If a grievance is established, what remedies (if any) should Ms Havea receive?
- (f) Did the employer breach its good faith obligations to Ms Havea and if so, should it be penalised?
- (g) Did the employer fail to give Ms Havea proper notice of termination, in that it should have allowed her to work out her notice period?

What is Ms Havea's work history?

[7] Ms Havea has a long and proud work history with different organisations. She began working at the customer call centre in mid-2017. Her employment agreement identified Staples New Zealand Limited as her employer.

[8] Ms Havea really enjoyed her work and loved her colleagues, including Ms McCall and Ms Su'a. She was surprised to be hired at her age and appreciated Ms Su'a giving her the opportunity. My impression was of a warm relationship between Ms Havea and Ms McCall, including a cultural connection. Ms McCall describes Ms Havea as a really good worker overall, someone who was punctual, gave 100%, made everyone laugh and was fantastic for team morale.

[9] Colleagues knew Ms Havea planned to retire. Ms Havea says she had no intention of resigning although she was looking forward to retiring at 65 years of age. She turned 65 in December 2021. At that time, she would have automatically been entitled to her pension and Kiwisaver. She shared with several colleagues that she would put on a big shout as her retirement was something she was looking forward to after having been in the workforce for 49 years.

Who was Ms Havea's employer?

[10] Ms Havea's employment agreement named Staples New Zealand Limited. There were several name changes over the years. The Authority received evidence of the first name change after Ms Havea's appointment being notified to staff. Her recollection is mainly of different procedures being adopted when names changed, which Ms Havea and her colleagues had to keep up to date with. Others did not see there having been such changes.

[11] Ms Havea did not have a strong view regarding which of the two respondent companies was her employer, although she did not recall seeing the word “*Holdings*” in association with NXP. The respondents assert that NXP Limited was the employer.

[12] As the human resources manager, Ms Su’a’s position was that NXP was Ms Havea’s employer. She described NXP Holdings as the ultimate owner of NXP and incorporated specifically for the purpose of purchasing the shares of NXP, which then had a different company name. Ms Su’a says that NXP Holdings does not have any operating activities nor any employees and never has. It has never been registered with the IRD as an employer. None of this was disputed on Ms Havea’s behalf.

[13] Ms McCall’s understanding was that NXP Limited is the employer, with her using that company’s name when she is hiring staff.

[14] Some templated documents referred to NXP without a full company name. There was no amended employment agreement or letter referring to the current employer but Ms Havea’s final payslip was in NXP Limited’s name as was the document signed at the end of her employment, referred to below.

[15] I conclude that Ms Havea was employed by NXP Limited.

What happened with training and performance?

[16] Ms Havea felt she had not been trained as such when she started with the business, other than sitting watching someone else work. There was a trainer but that person went overseas. Ms Havea saw some colleagues who started work after her getting a full three week training period including time away from the call centre room. She felt disappointed as she had been promised training but it had not been delivered. Ms McCall acknowledged that there was a gap in induction for those employed during a particular period.

[17] In 2020 NXP undertook a performance and development review with Ms Havea. This seems to have been part of a standard annual review. Although not entirely obvious, it appears Ms Havea’s performance was not seen as problematic. Some skills development areas were identified including learning new software tools.

[18] Ms McCall describes mistakes as not unusual in the call centre, usually resulting in a chat with the staff member and provision of some tips about how to avoid the mistake in

the future. If a trend is noticed, a more in-depth discussion might be held with an informal plan put in place. Ms McCall does not see this as a negative process, rather a way of helping staff improve and upskill.

[19] Ms Havea reported to the call centre team leader who in turn reported to Ms McCall. Ms McCall described herself as being closely involved with the customer ticketing system so being familiar with the work of up to 20 call centre staff. Ms McCall started to notice some issues around Ms Havea's ability to retain information although she did not regard this as a major issue as Ms Havea was always professional and friendly and was a valued team member. The team leader and trainer were asked to work with Ms Havea.

[20] In late February 2021 NXP put Ms Havea on a performance improvement plan (PIP or plan). According to Ms Havea, on 23 February the team leader simply talked to her about being on a plan and some training to be arranged. She did not recall seeing a written plan then although seemed to accept that it was emailed to her after the meeting.

[21] NXP provided the Authority with a document entitled Informal Performance Improvement Plan. The written plan identified some specific incidents through ticket codes, including actions such as allocating the ticket to an incorrect department. Ms Havea at times in the Authority seemed not to have read the plan or even realise that there was a written plan. At another point she accepted one had been sent to her although found it difficult in the (heavily monitored) call centre environment to read things not directly related to her work tasks.

[22] Ms Havea expressed to the Authority that she was so happy that she was put on the plan as she could now have some training. She bore no ill will to the team leader who she saw as a friend. Ms Havea did not shy away from the possibility of her performance needing improvement, saying that of course she could have done better if she had known what that better thing was.

[23] The written plan indicated there were to be formal review meetings weekly with the first review meeting date noted as 2 March 2021. No meeting appears to have occurred then although on that day Ms McCall asked the team leader for a copy of the PIP, which was sent through. Ms Havea recalls no further discussions with the team leader about the plan after the initial meeting.

What do the parties say occurred on 3 March 2021?

[24] On 3 March 2021 Ms McCall asked to talk to Ms Havea towards the end of her shift. Ms McCall says she wanted to have an informal catch up and offer her personal support to Ms Havea. Ms McCall did not see this to be a formal meeting but rather a check in with Ms Havea about the informal PIP and an offer of Ms McCall's personal support.

[25] There is some dispute about the time and venue of the meeting but that did not significantly assist with determining the crucial issue which is what was said at the meeting. Electronic call centre records were more in keeping with Ms McCall's evidence than that of Ms Havea.

[26] Ms Havea and Ms McCall largely agree on the initial stages of the meeting. There was discussion about one of Ms Havea's customer matters. Ms McCall did not have the relevant ticket number. There was likely some mention of the informal PIP.

[27] From there the versions separate.

[28] Ms Havea's version is that Ms McCall then said "*I'm going to have to let you go*", indicating that she did not want to do it but had been told from above (higher NXP management). Nothing more explicit about the reason for that edict was mentioned with Ms Havea left wondering whether the higher bosses were not happy with her work. Ms McCall told Ms Havea to come in the next day and sign the leaving letter.

[29] Ms Havea says that she then told Ms McCall that it was best for her not to come back as she did not want to make a fuss. She describes it being embarrassing to have been sacked. Ms Havea said she would come in in the morning and sign any papers. She did not want a farewell as she was not leaving on good terms.

[30] Ms Havea described the meeting as probably about half an hour but could say little else about what happened during that time. Ms McCall says the meeting lasted almost 45 minutes, which was longer than she was anticipating.

[31] Ms McCall's version of events is that she showed Ms Havea the written informal PIP but Ms Havea did not remember it. This was in keeping with evidence at the Authority's investigation meeting where there was occasional lack of recollection about the plan. Ms McCall says she mentioned moving to a formal plan.

[32] Ms McCall recounts what was to be a catch up meeting taking an unexpected turn when Ms Havea started talking about leaving NXP. This was after Ms Havea seeming frustrated with herself about mistakes, saying she had always been a good worker and becoming a little teary. Ms McCall says Ms Havea commented at the meeting that she had been telling her husband that she was getting tired and starting to forget things. Ms Havea accepts that she said this but stressed that it was in passing.

[33] Ms McCall says she was surprised when Ms Havea suddenly said she wanted to resign. Ms McCall asked her to rethink her decision but Ms Havea remained adamant about her resignation. Ms McCall asked again if Ms Havea was sure and said Ms Havea had options if she wanted to stay at NXP. Ms Havea continued to say she wanted to leave and that she wanted to resign immediately, going quietly and not making a fuss. Ms McCall suggested that Ms Havea should at least stay the week, so there was time for a staff lunch and nice farewell gift.

[34] Ms McCall recalls offering to pay an additional two weeks' pay. Ms Havea agrees that was probably mentioned but she had blanked it out due to stress, after what had happened. Ms Havea wanted to get her final pay sorted out that day but Ms McCall told her she would need to come in tomorrow to sign the paperwork.

[35] In summary Ms McCall completely denies having asked Ms Havea to resign or telling her that she had to be let go. Ms McCall was surprised when Ms Havea said she wanted to resign and encouraged her to reconsider.

What do Ms McCall's notes say?

[36] Ms McCall provided a written outline of the meeting which was the tidied up version from her notes made at the meeting. She had done the tidying a couple of days after the meeting, that being a date noted on the document. The original notes were not available.

[37] The outline describes the purpose of the meeting as being to "*talk through informal plan and intention to move to formal*". The "*key call outs*" are listed as follows, although Ms McCall accepts that they would usually have been documented as points to go into the meeting with:

- Informal plan = no improvement
- Love having you here, great addition to team, excellent work ethic but mistakes hurting customers
- Shift to formal, may be a long road but absolutely need to put your best efforts in.

[38] There are then notes outlining the discussion including, presumably Ms McCall, referring to mistakes and Ms Havea asking what mistakes? Further:

[Ms Havea] Forgetting, getting tired

Tears – I just want to leave quietly.

[Ms McCall] Are you sure? You have options.

[Ms Havea] Yeah I'll tell husband

Walk away with head held high

[Ms McCall] When do you want to leave?

[Ms Havea] I'll leave now

Don't want to make a fuss

[Ms McCall] Time with NXP, work ethic, leave without notice but happy to pay you 2 weeks

[Ms Havea] Oh that's nice of you

[Ms McCall] Are you sure?

[Ms Havea] Yes

[Ms McCall] Need to get paperwork for payment drawn up, could take a couple of days for approval

[Ms Havea] Can't I sign now? How much will I get? Can I get paid now?

[Ms McCall] No – no idea

If you must leave today I need you to come back tomorrow. Have a think

[Ms Havea] Want to go today

[Ms McCall] What about team? *[Ms Havea]* They'll be ok

[Ms McCall] You don't want to stay until at least end of week?

[Ms Havea] No

[Ms McCall] Are you sure?¹

[39] No reply is recorded. This document was not sent to Ms Havea after the meeting.

¹ Presumed speaker identified by context, not marked in notes.

[40] Ms Su'a spoke of a discussion with Ms McCall after the meeting with Ms Havea, where Ms McCall said she had asked Ms Havea a number of times if she was sure she wanted to leave. Ms McCall reported to Ms Su'a that Ms Havea indicated she did not want to work out her notice period.

What followed that evening?

[41] After the meeting Ms Havea packed up her personal items, made sure everything was turned off and left. She initially indicated to the Authority that she had done this alone but when asked about Ms McCall saying she had assisted Ms Havea with the packing, Ms Havea accepted that Ms McCall probably did. Ms McCall helped Ms Havea out to the car with her things and gave Ms Havea a big hug. She acknowledges Ms Havea seemed emotional.

[42] Ms Havea recalls sitting in her car for about half an hour crying with shame and embarrassment at the thought of having to tell her husband what had happened.

[43] About 10pm Ms McCall messaged Ms Havea asking if she was okay? Ms Havea described herself as needing to get psyched up about having a better life without work. She spoke to her husband who advised her not to say anything nasty, just to be polite. So she messaged:

Oh yes Taylia
I am excited about my retirement
Learning now to live instead of time keeping for work Mon – Fri
It was a great decision
NXP is a great Employer
Thank you always dear
Will see you tomorrow morning to sign paperwork
Text me when to drive in to Highbrook
Rest up dear lady
See you tomorrow lovie

[44] Seemingly on the same evening, Ms Havea texted her team leader:

Thank you Rangitira ... for all your help & advice
I have appreciated your patience & kindness when I think you wanted to hit my head with a newspaper
Yes, my memory has failed a lot
But that comes with aging
I have loved

enjoyed my time at NXP
Everyone is so awesome
You do have an ACE team there
Take care
keep well
stay safe

Ngā mihinui
Jackie

[45] These messages create a very different picture to the way Ms Havea describes herself as feeling that evening, namely ashamed she had been dismissed. She reports messaging her work colleagues as a group, saying she was sacked. The message group did not include Ms McCall or the team leader.

What occurred the next day?

[46] Ms Havea had to go back in to NXP. She mentions that she would normally have taken her husband, a former union delegate, in as a witness to such a meeting. But he said no, it's just a straight sacking. He advised his wife to go into NXP and sign the papers.

[47] Ms Havea phoned Ms McCall in the morning of 4 March 2021 to say when she was coming in. Ms McCall asked whether Ms Havea really wanted to go with Ms Havea remaining adamant. Ms McCall also asked if she wanted a farewell, even if it was later. Ms Havea politely declined saying she did not want to make a fuss.

[48] Ms Havea and Ms McCall also texted in a friendly manner about some papers Ms Havea left in her drawer and wanted Ms McCall to retrieve.

[49] When Ms Havea came into reception, Ms McCall asked if she wanted to come upstairs rather than meeting there. Ms Havea indicated she did not want to as everyone would make a hoo-hah if she went upstairs.

[50] Ms Havea thought she should have been given a letter of termination but did not ask about that. Instead she was given a document headed "Without Prejudice Record of Settlement". This is in a similar form to the record used by Ministry of Business, Innovation and Employment mediators when recording and signing off a mediated settlement although there was no provision for a mediator's signature here.

[51] The record specifies that Ms Havea's employment will end by agreement, effective from 3 March 2021, with NXP paying her four weeks' pay in lieu of notice (as her agreement specified) and two weeks' "pay compensation".

[52] Ms Havea understood that she would not get her pay unless she signed although Ms McCall denies saying this. Ms McCall's sense was that Ms Havea wanted to move on promptly, which is in keeping with Ms Havea not wanting to see her colleagues. Ms Havea spent about five to ten minutes reading the document. She signed it, as Ms Su'a did later. The record contains a standard full and final settlement provision but NXP explicitly chose not to rely on there being any binding settlement such as would bar Ms Havea's claims.

[53] Ms Su'a describes that form of agreement being used for NXP settlements which are sent to a mediator for sign off where there is an employment issue. She said this type of document would not be used again (where a simple departure only occurred).

[54] Ms Su'a's evidence was that NXP recorded dismissals in writing, usually in the form of a letter from her recording the process leading to the dismissal and closing out the final pay and any further support being offered. This is in keeping with what would be common for a company of this size.

[55] For resignations the company usually received letters of resignation but has sometimes relied on managers passing on that a staff member had said they were resigning. Ms McCall thought in this case the settlement agreement was sufficient documentation and understood an agreement was required for auditing purposes when payments over and above contractual entitlements were made.

[56] Ms McCall gave Ms Havea a card and a client gift basket as a farewell present, this being all she could find on short notice.

[57] Ms Havea describes an extended period of struggling to cope with her sense of having been dismissed, the difficulty in telling her wider family and having to apply for a benefit and a Kiwisaver hardship payment.

What is concluded about 3 March 2021?

[58] Both Ms Havea and Ms McCall came across as genuine in their belief about what had occurred at their meeting. I need to determine the most likely explanation.

[59] Ms Havea's departure from the workforce was a significant event for her. She had a strong sense of mana that she came from a generation of workers and had herself worked for almost 50 years, without ever being unemployed on a benefit.

[60] Ms Havea says there is no way she would have resigned in March 2021 when it was nine months before her pension and Kiwisaver became available and she still had bills to pay. Further, if she had wanted to resign she would have put in a proper resignation letter as she had done previously when she left other roles.

[61] Ms Havea did not have a strong recollection of events in detail but did accept a number of things Ms McCall said happened during the latter part of the 3 March conversation. Ms Havea's evidence about timing and colleagues' presence just before the meeting did not fit particularly well with the electronic records. She was uncertain about where the meeting took place and gave conflicting evidence about whether the informal plan was mentioned at the meeting. She recalled Ms McCall talking about further training for her but accepted that would not have made sense if Ms McCall intended to dismiss her.

[62] The prospect of Ms McCall saying in this context that she had been told from higher up to let Ms Havea go seems unlikely for a number of reasons. Ms McCall says no one other than herself and the team leader were involved in the PIP. She reports to the CEO so he was the only person who would be seen as higher up and he would not have involvement in day to day mistakes. Ms McCall strongly denied receiving any indication from above that certain action should be taken against Ms Havea.

[63] Ms Su'a and Ms McCall confirmed that if the company was going through a disciplinary process it would write to the employee, setting out the concerns, describing the investigation process and offering the opportunity to bring a support person. There was no such letter here. The approach described was consistent with that in NXP's performance management guidelines although they relate to an earlier stage in the process.

[64] Ms McCall did not want Ms Havea to leave in March 2021. There was a systems upgrade coming up requiring all hands on deck and recruitment of new staff was costly and time consuming. In addition, Ms Havea had a lot of outstanding characteristics as an employee which Ms McCall did not want to lose – a valued team member who was special to the staff.

[65] At the investigation meeting Ms Havea said that Ms McCall was not a nasty lady. Ms McCall described the meeting as having happy/sad moments, very emotional. Ms McCall was surprised that Ms Havea wanted to go earlier than when she turned 65 but received no sense from Ms Havea that Ms Havea did not know why she was going or that Ms Havea thought she was being dismissed. Ms McCall considered that between the 3 and 4 March discussions, she asked Ms Havea three or four times whether she was sure she wanted to go.

[66] I explored with Ms Havea what passably motive NXP could have had for getting rid of her. The only things she could think of were her age, related lack of work speed and the idea that the mistake mentioned on 3 March must have been a terrible one. Ms Havea did not suggest that Ms McCall ever commented on her age or implied it was a problem. Under cross examination Ms Havea accept that it did not make sense for NXP to want to end her employment.

[67] Ultimately, I conclude that this was a tragic case of misunderstanding. Ms Havea really loved her job with NXP and the people there. Neither party really wanted her departure but it was not avoided.

[68] An objective observer would see Ms Havea saying she was going to leave. She thought she had been told to go but there was no satisfactory objective basis for that view. Ms Havea did not check with her employer about her understanding that she was being told to go. She did not want to go but she then tried to cover her embarrassment by making it seem like she was enthusiastically retiring early when that was not her wish.

[69] NXP, Ms McCall in particular, tried several times to check in with Ms Havea if leaving was really what she wanted but was unable to get a sense that Ms Havea thought she was leaving at NXP's request. Ms Havea's texts and the 4 March meeting gave no basis for Ms McCall to do anything other than go along with what Ms Havea seemed determined to do, to leave NXP.

[70] One might have hoped that this situation could have been resolved early after Ms Havea's departure but that was not to be. Ms McCall says NXP would have loved to have Ms Havea back had she called to say she had changed her mind. Unfortunately, by the time her grievance was raised via a 21 May 2021 letter from her representative, the training

for the system upgrade was completed and the interface was hugely different to what Ms Havea knew.

Was Ms Havea disadvantaged regarding the PIP?

[71] I turn now to look at whether Ms Havea has a disadvantage grievance based on an unjustified action by NXP, focusing on the PIP.

[72] Ms McCall was not able to recall precisely why, as of 3 March 2021, she thought that a reset of the plan was needed. She thinks possibly it was because the informal plan did not have enough detail, plans or support levels about who was doing what to support Ms Havea. Ms McCall did not recall going through NXP's ticketing system to identify in the week since the informal plan was set, what Ms Havea's performance had been.

[73] Ms McCall's witness statement referred to her considering moving Ms Havea to a formal plan but given the notes of the meeting I find Ms McCall went into the meeting intending that that was going to happen.

[74] Ms McCall did not see herself taking over and making the plan formal as a negative thing, in that she is able to offer more time and attention to such a project than the team leader who had up to 20 reports. However, the content of a formal plan would not necessarily be any different to that of an informal plan and Ms McCall could be involved in offering support to someone on an informal plan. I accept that Ms McCall was not intending to come across as threatening at the 3 March meeting in terms of her discussion about the movement to a formal plan.

[75] NXP's performance management guidelines specify that if, following an informal advice meeting, performance is not improved to an acceptable level in the agreed timeframe, a formal performance management process will commence. At the first formal performance management meeting the guidelines require communication that that the consequences of failing to meet required standards may be disciplinary action which could extend to termination of employment.

[76] The evidence was that it was unusual for performance plans to end up being the subject of disciplinary action and Ms McCall reported success with another staff member's plan resulting in a substantial turn around in performance.

[77] When standing back and looking at the wider picture, NXP acted in an unjustified manner regarding the PIP, taking into account:

- The initial team leader discussion not seemingly referring to nearly as many incidents as were later specified in the written plan
- Ms Havea not having the benefit of that document at the meeting
- The team leader indicating there would be training and support/training specified in the plan but it not being evident that support or training had been given
- The lack of discussion from the team leader after the informal PIP was in place, with the date for the scheduled meeting having passed
- Ms McCall then taking over, noting no improvement
- The details of a situation Ms McCall mentioned in the 3 March meeting appearing not to have been made available
- The informal plan changing to a formal plan despite Ms McCall being able to offer support even with an informal plan.

[78] From an objective perspective these events cumulatively disadvantaged Ms Havea, taking the scrutiny of her performance to a higher level and making her employment thus more precarious although as it turned out, only for a very short period on 3 March 2021. A disadvantage personal grievance is established.

[79] I have considered whether to award some compensation for humiliation, loss of dignity and injury to feelings but given Ms Havea's enthusiasm about being on a formal plan and having discussions with Ms McCall, I do find any negative feelings established. No remedy is awarded.

Was Ms Havea actually or constructively dismissed?

[80] I have concluded that NXP did not inform Ms Havea that she had to go or otherwise actually dismiss her. She resigned. The question is then whether she was constructively dismissed – was her departure at the employer's impetus rather than her own?

[81] The categories of constructive dismissal are often identified as, but not restricted to, situations where:

- (a) An employer gives an employee a choice between resigning or being dismissed;
- (b) An employer has followed a course of conduct with a deliberate and dominant purpose of coercing the employee to resign; and
- (c) A breach of a duty by an employer causes an employee to resign.²

[82] The current situation does not come within the first category. NXP did not give Ms Havea a choice between resigning or being dismissed. Further, I do not accept that NXP operated with a deliberate and dominant purpose of coercing Ms Havea to leave, thus the second category is not established.

[83] The third category relates to a breach of duty. Having identified concerns about the PIP process I have considered whether they might be sufficient to establish a constructive dismissal under this head. This category requires the following two stage test to be met:

- (a) The resignation being caused by the employer's breach of duty; and
- (b) The breach of duty being sufficiently serious to make it reasonably foreseeable by the employer that there was a substantial risk of resignation.³

[84] Ms Havea left NXP because she thought she was told she was being let go. She may also have been influenced by her experience of tiring easily and forgetting things.

[85] I have considered whether Ms Havea's sense about what happened with the PIP at the 3 March meeting could have caused her to leave. The evidence did not support that. Ms Havea said that she would have loved to have shifted to a more formal plan and it would have been wonderful to have met further (with Ms McCall) for discussions. She was not frightened. Ms Havea indicated she was a strong woman who, if told she needed to improve, would do it. NXP's actions regarding the PIP were not the catalyst for her leaving. Even if they were, subject to following a fair process, the company was entitled to raise its concerns and Ms Havea's expressed willingness to NXP to take on board

² *Auckland Shop Employees Union v Woolworths (NZ) Limited* [1985] 2 NZLR 372.

³ *Auckland Electric Power Board v Auckland Provincial District Local Authorities Officers Union of Workers (Inc)* [1994] 1 ERNZ 168 (CA) at 172.

concerns and receive more training would not have made a risk of resignation reasonably foreseeable.

[86] For the sake of completeness, I note that Ms Havea's statement of problem alleges that she was constructively dismissed because she had to sign the settlement agreement in order to receive her final pay. That is not supported by the evidence. Ms Havea packed up her belongings on the night of 3 March, with only a very general sense of having to complete some paperwork. Her text that evening also makes it clear she is leaving. Her departure was not motivated by the settlement agreement which was not presented until 4 March.

[87] Ms Havea has not established she was constructively dismissed.

Was Ms Havea discriminated against based on her age?

[88] The onus is on Ms Havea to establish that she was discriminated against.⁴

[89] Feeling unable to understand what happened with her departure, Ms Havea wondered whether she was discriminated against due to her age. She was older than many of her colleagues and recognised that she was not fast in her work, in the pacy call centre environment. However, I have found no basis to establish such discrimination here.

[90] Submissions attempted to draw evidence regarding Ms Havea's performance together in such a way as to establish that NXP's systems upgrade was the more likely reason that NXP wanted to let Ms Havea go. Further that NXP was not willing to provide formal training and have Ms Havea on a PIP in the way other employees were, due to her age. These themes were not well supported by evidence from cross examination or the Authority's questions of Ms McCall and Ms Su'a, nor by any detailed evidence from Ms Havea regarding colleagues' situations compared to her own.

[91] Ms Su'a noted that the average age in the workplace is around 40 and NXP has a number of staff who are in their fifties and sixties. Both Ms McCall and Ms Su'a came

⁴ *Idea Services Ltd v Crozier* [2017] NZEmpC 77.

across as genuinely respectful of Ms Havea and her status as a mature person in the workplace.

Did NXP breach its duty of good faith?

[92] For Ms Havea, it was argued that NXP was not open and communicative about its concerns that she could not retain information and made no improvement on her plan.

[93] Although the evidence supporting this claim was not very detailed, what there is supports some concerns being mentioned to Ms Havea. Prior to the informal PIP the trainer and team leader were asked to work with Ms Havea to improve her knowledge retention skills. A website with a decision tree was established for Ms Havea to help step her through the processes she needed to follow with customers.

[94] The team leader was supposed to meet with Ms Havea for a PIP review on 2 March 2021 and the reason that did not happen was not established. However, Ms McCall did meet with Ms Havea the following day. Elements of the plan's implementation and change are covered by the disadvantage grievance.

[95] Even if there were elements of a reluctance to be explicit with Ms Havea about her knowledge and information retention, the evidence was not sufficient to establish a deliberate, serious and sustained breach required to impose a penalty.⁵

Was there a failure to provide proper notice of termination?

[96] Ms Havea's employment agreement provides for her to terminate the agreement on four weeks' notice in writing unless a shorter notice period is agreed with the employer. Dismissals on notice require the same period. Here the parties agreed that payment be made in lieu of notice. Ms Havea sought that arrangement and NXP agreed. Four weeks' wages were paid.

Costs

[97] Costs are reserved.

⁵ The Act, s 4A(a).

[98] The parties are encouraged to resolve any issue of costs between themselves. If they are not able to do so and a costs application is made the Authority would take into account the success Ms Havea had with one of her claims, although without receiving a remedy, and NXP's success in defending the other claims. The Authority's usual notional daily tariff and any factors requiring an upward or downward adjustment would also be considered.⁶

[99] A party seeking costs should lodge and serve a memorandum on costs within 14 days of the date of this determination. From the date of service of that memorandum the other party would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

Nicola Craig
Member of the Employment Relations Authority

⁶ See www.era.govt.nz/determinations/awarding-costs-remedies.