

**Denford v. Canterbury Area Health Board and NZ Nurses Assn (Inc)****C.L.C. 70/89****Judgment: 29 September 1989**

**Court:** Palmer, J  
Mrs H M Brown, Mr I A Whitelaw

**Hearing:** Christchurch, 31 July, 1-4 August and 11 August 1989

**Counsel:** Mr A J Forbes and Miss S Lennon for Applicant  
Mr J J Brandts-Gieson for First Respondent  
Miss B A Buckett and Mr O J Robson (Advocate) for NZ Nurses Assn  
(joined pursuant to S.299)

**Doc 2000****Labour Relations Act 1987**

**PERSONAL GRIEVANCE** — Application for LEAVE pursuant to S.218—  
Worker dismissed for injecting patient without doctor's authorisation and  
dishonestly concealing fact — Whether union failed to act, etc — Whether  
**DISMISSAL** justified and fair — Admissibility of tape recorded evidence —  
Whether "a worker" — Nurse

A nurse alleged that her union had failed to act or act promptly in pursuing an unjustified dismissal claim. She applied for leave pursuant to S.218 LR Act for direct access to the Labour Court.

The nurse had injected a sedative into a disruptive patient without authorisation from a doctor. The patient's condition deteriorated and a doctor was called. The doctor asked the nurse whether any drugs had been administered to the patient. The nurse untruthfully replied, "No".

On 16 March, during an interview with the chief nurse, the nurse admitted administering the drug and concealing the fact from the examining doctor. She was suspended.

Although not a member, the nurse sought assistance from the union. The union informed her that, even if she became a member, there was little it could do in the circumstances.

On 20 March the nurse was summonsed to a meeting with senior hospital officials to discuss her future employment. Following the meeting, she was dismissed.

On 31 March the nurse posted an application to join the union.

On 11 April the nurse met with union officials to discuss her dismissal. She secretly taped part of this meeting.

After investigating the nurse's claims, the union declined to pursue the matter further.

The Court considered:

- 1) Whether to admit the tape recording as evidence, notwithstanding that it was an incomplete and imperfect recording.
- 2) Whether the nurse had locus standi; specifically, whether she was a union member when she requested the union to pursue her grievance.
- 3) Whether the nurse had any exercisable industrial rights in a grievance setting.  
The union contended that as the nurse was not an actual worker at the time of formally requesting the union's help, she was a category "B" member under the union rules and therefore had no industrial rights.
- 4) Whether the union had failed to act or act promptly.
- 5) Whether the dismissal was substantively justified.

## 6) Whether the dismissal process was fair.

The nurse submitted that the chief nurse, who was present at the meeting of 20 March, had usurped the general hospital manager's statutory power of dismissal.

**Held:**

- 1) The tape recording was admissible as evidence pursuant to S.303(1) LR Act.
- 2) The nurse became a union member on 31 March when she completed an application and caused it to be posted. She was therefore a union member on 11 April when she formally requested the union's assistance.
- 3) Category "B" of the union rules was inconsistent with S.60 LR Act; specifically, pursuant to S.60, workers intending to work had the same industrial rights as those actually working. To this extent S.60 LR Act modified category "B". The nurse was intending to work after her grievance was resolved and therefore had exercisable industrial rights in a grievance setting.
- 4) The union had dealt conscientiously and purposefully in pursuing the nurse's grievance. It was justified in declining to pursue the matter further.  
Application for leave declined.
- 5) The dismissal was substantively justified.
- 6) The dismissal was procedurally fair.

The chief nurse had acted as a consultant only and had not usurped the general hospital manager's statutory decision-making power.

**Cases referred to in Judgment:**

Madden v. Peak Rogers and Co [1981] ACJ 129

NZ Workers' IUOW v. Proprietors of Tahora No. 2F2 — Papuni Station [1989] 1 NZILR 888

McMullan v. Bowley & G R Stevens & Co [1981] ACJ 617 (CA)

Allfrey v. South Canterbury Hospital Board [1983] ACJ 131

Peden v. Tingeys Ltd [1985] ACJ 471

Jones v. Home Bay Cottage [1980] ACJ 61

Perera v. Manukau City Council [1987] NZILR 78

Air New Zealand Ltd v. Johnston [1989] 2 NZILR 49 (CA)

Fiordland Venison Ltd v. Minister of Agriculture [1978] 2 NZLR 341 (CA)

Auckland City Council v. Hennessey [1982] ACJ 699 (CA)

Brunel v. Chas S Luney Ltd & Ors [1988] NZILR 1456

North Island Wholesale Groceries Ltd v. Hewin [1982] 2 NZLR 176 (CA)

Sinclair v. Neighbour [1967] 2 QB 276

Cyril Leonard & Co v. Simo Securities Trust Ltd [1971] 3 All ER 1313

Simi v. Surfseeker Sports Wear Ltd [1986] ACJ 836

Auckland Shop Employees IUOW v. Woolworths (NZ) Ltd [1985] ACJ 963 (CA); [1985] 2 NZLR 372

Squire v. Waitaki N.Z. Refrigerating Ltd [1985] ACJ 370

Marlborough Harbour Board v. Goulden [1985] 2 NZLR 378 (CA)

NZ Amalgamated Engineering etc IUOW & Anor v. Milburn NZ Ltd [1989] 1 NZILR 57

Daganayasi v. Minister of Immigration [1980] 2 NZLR 130 (CA)

NZ (with Exceptions) Timber Industry Employees IUOW v. Carter Oji Kokusaku Pan Pacific Ltd [1987] NZILR 170

R v. Awatere [1982] 1 NZLR 644 (CA)

Marshall v. Whangarei City Council [1987] NZILR 172

Leary v. National Union of Vehicle Builders [1971] 1 Ch 34

Lane v. Norman (1981) 66 LT 83

Wislang v. Medical Practitioners Disciplinary Committee [1974] 1 NZLR 29

Cowley v. Ball [1980] ACJ 211

Scrimgeour v. Tamaki City Council [1987] NZILR 915; (1988) 2 NZELC 95,842

### **JUDGMENT OF THE COURT DELIVERED BY PALMER, J**

#### **Introductory:**

Mrs Denford contends that she was unjustifiably dismissed by the respondent board on 21 March 1989. The Canterbury Hospital Board was superseded, we comment, from 1 July 1989, by its statutory successor, the Canterbury Area Health Board. It now seems to us appropriate that we should formally amend the name of the respondent to the Canterbury Area Health Board, reflecting the board's corporate status since 1 July 1989, notwithstanding that the Canterbury Hospital Board dismissed Mrs Denford and is also correctly cited as the respondent when she (Mrs Denford) filed her application herein in a grievance setting on 18 May 1989. We now formally amend the respondent's name accordingly.

Mrs Denford, who is a registered nurse and who was employed by the Canterbury Hospital Board as a staff nurse at the Christchurch Public Hospital until she was suspended from her employment on 16 March and subsequently dismissed on 21 March 1989, contends that her dismissal was:

- (i) substantively unjustified; and
- (ii) grossly vitiated by procedural unfairness inherent in the manner of her dismissal by the board.

She (Mrs Denford) formally seeks leave from this Court, pursuant to section 218(1)(a) of the Labour Relations Act, to have her contended personal grievance heard and determined upon her personal application.

Mrs Denford, in a grievance setting, seeks, in her application/s filed herein:

- (i) a formal declaration by this Court that she (Mrs Denford) was unjustifiably dismissed by the respondent board;
- (ii) immediate reinstatement in her former employment by the board;
- (iii) reimbursement of a sum equal to the whole of the wages lost by her since her dismissal; and
- (iv) compensation for humiliation, loss of dignity and injuries to her feelings in the sum of \$5,000.00.

Mrs Denford, through her counsel, subsequently, during Mr Forbes' closing submissions, very significantly modified her application/s in compensation and wage reimbursement settings made pursuant to sections 227(c)(i) and 229 respectively of the Labour Relations Act. We shall subsequently particularise the modified applications by Mrs Denford in this immediate context and her continued, but flexibly framed, application/s as submitted to the Court by counsel in his closing submissions for reinstatement of Mrs Denford to her former employment by the board.

Mrs Denford seeks leave to apply directly to this Court for a hearing and determination of her professed personal grievance because she contends that she was unable to have her grievance dealt with, and/or was unable to have it dealt with promptly, in accordance with the procedures applicable thereto by her contended union, the New Zealand Nurses' Association (Inc).

At the commencement of the hearing the nurses association (hereinafter referred to as either NZNA and/or the nurses association and/or the association) was represented by Miss B A Buckett, as counsel, and its industrial officer, Mr O J Robson. The association was formally then joined as a second respondent to the proceedings pursuant to section 299(2) of the Act. Plainly, we comment, it was justly entitled to be heard during the proceedings and to be accorded party status.

It was — and is — a fundamental contention of the association that Mrs Denford has no qualifying status “*locus standi*” in a personal grievance setting, and that consequentially her application/s should be struck out. Indeed, the association, on 31 July 1989, filed herein a formal application to strike out the proceedings commenced by Mrs Denford in this Court.

Miss Buckett, we record, was fully heard upon the association's threshold contention/s and Miss Lennon, who appeared as counsel assisting Mr Forbes, was then heard fully in reply. We formally ruled upon these preliminary issues in our interim ruling herein, as follows:

At the outset of the hearing counsel for the New Zealand Nurses Association, which has been joined as a party, addressed particularised submissions to the Court concerning a threshold issue which is dealt with in the second respondent's application filed herein on 31 July 1989. In short, the application by Miss Buckett was and is that the applicant, Mrs Denford, at material times lacked the status in a personal grievance setting which would enable her application to be dealt with. Miss Buckett relies upon section 209(d) and (e) in the objects clause of the Labour Relations Act dealing with personal grievance and additionally relies upon section 216(1) read in conjunction with section 218(1)(a) of the Act.

Counsel submitted that, indisputably in this case, Mrs Denford was covered by the material award at the time that her contended personal grievance arose. Within the setting of 216(1) counsel contended that the second limb of that subsection was not satisfied in relation to the contended grievance which the second respondent union was invited to pursue upon Mrs Denford's behalf. Counsel emphasised that the wording of the section requires — in its context — that the union should be required or requested to pursue the grievance at a time that the contended grievant is a union member. I simply paraphrase — in this setting — the subsection. Miss Buckett submitted that at the time the second respondent was required to pursue the grievance, Mrs Denford was not a member of the union, but became a member following that request and at a significantly later time.

We have closely noted the developed submissions of Miss Buckett which we merely summarise at this point. It was a subordinate submission of counsel that, even if at the material times Mrs Denford could be construed as a union member, that is to say the time when a request was made to the union to pursue her contended grievance, then she was within the rules of the second respondent — more particularly rule 6.2 of the 1989 rules which were provided to us — a category “B” member and not a category “A” qualifying member, pursuant to rule 6.1 of the rules. The legal consequences, in Miss Buckett's submission, of Mrs Denford being a category “B” member was that she did not have, in an industrial setting, personal grievance rights which she could pursue although she had professional rights associated with



her category "B" status. Again we simply summarise this subordinate submission which Miss Buckett developed.

In the course of her submissions Miss Buckett presented a chronology of events in relation to Mrs Denford's union membership. This chronology of events followed Miss Buckett's perception of what the evidence would establish.

It became quickly apparent to us in the course of hearing Miss Buckett's submission, and Miss Lennon in reply, that there were significant facts which were material to the submissions and which were in dispute. Those facts, for reasons which we find it unnecessary to fully enlarge upon at this juncture, are very important to the submissions which were made to us. More particularly, perhaps the most significant fact is when a request was made by Mrs Denford, or on her behalf, for the second respondent to pursue a contended personal grievance for the applicant. We have not at this point seen all the material correspondence associated with this issue and/or heard evidence concerning this particular issue. We have been provided with certain of the correspondence only which was produced. More particularly, we have been provided with letters from the applicant's solicitors dated 30 March 1989. We simply comment that in the letter from Messrs Duncan Cotterill & Co, solicitors, Christchurch, of 30 March, the author of the letter, upon Mrs Denford's behalf, states in paragraph 5:

Under the Labour Relations Act 1977 (sic) Mrs Denford is entitled to re-join your Association and request that it pursues a personal grievance on her behalf. Would you please confirm that she can do this and would you please advise whether your Association is prepared to pursue a personal grievance on her behalf (i.e. assuming that there is no other prescribed procedure or remedy available to enable her to pursue her challenge to the decision to dismiss her).

We have simply isolated this paragraph in the context of that letter. It is plainly arguable that this paragraph of the letter concerns a future state of affairs inasmuch as the letter speaks of a request to the union which Mrs Denford may formally make. We do not propose to develop this issue further at this point. It will suffice for us to say that, having heard Miss Lennon, we appreciate that the facts which are highly material to the submissions of Miss Buckett — we speak of her primary submissions — are in dispute at this point of the hearing. It would be entirely inappropriate, given these disputed facts, for us at this point, we conclude, to rule upon the threshold submissions we have heard. Justly to the applicant and to the second respondent, it is plainly necessary that this Court should hear evidence which is directed (*inter alia*) to the threshold issues and which, as it seems to us, will be inextricably related to the contended grievance upon the merits. It is only when we have heard that evidence — and are able to reach conclusions upon material facts — that we can safely in our view, and appropriately, we comment, deal with the threshold issues having regard to the submissions we have heard and any future supplementary submissions which counsel, with the leave of the Court, address to us.

For the purpose of record, I comment that following the hearing of submissions from Miss Buckett and Miss Lennon yesterday afternoon, the Court retired and considered those submissions, informing counsel close to 5 o'clock as to the course which we would be taking, which this formal ruling simply develops.

We comment that we have considered certain further legal submissions which were addressed to us by Miss Lennon, namely her contention as to the liberal construction in her submission which should effectively be given to

the material provisions of sections 216(1) and 218(1)(a) of the Labour Relations Act. Miss Lennon founded her submissions in this setting, upon the approach taken under a different, but in her submission, similar provision of the Industrial Relations Act dealt with by Castle J in the case of Madden v. Peak Rogers and Co [1981] A.C.J. at page 129. We further comment that we have drawn to counsel's attention a very recent decision of the Chief Judge of this Court concerning section 216(2) of the Labour Relations Act, namely His Honour's decision in N.Z. Workers' IUOW v. Proprietors of Tahora No. 2F2—Papuni Station [1989] 1 NZILR 888.

For the reasons which I have merely summarised, we now rule that the threshold application and submissions made by Miss Buckett and responded to by Miss Lennon will be reserved at this point. We shall subsequently deal with this threshold issue at an appropriate later point in the hearing, when we are in a position to determine the facts which are material to the issues. We are not, I re-emphasise at this point, in a position to do that, given the dispute that plainly exists.

We have not heard from Mr Brandts-Giesen upon this threshold issue. Upon the hospital board case, it has not seemed to us appropriate that we should do so.

We reserve the right for the second respondent, through counsel and/or advocate, to renew its application upon the threshold issues at an appropriate time during the hearing, when we will probably hear further submissions from the advocate to which, of course, Miss Lennon will have the opportunity of responding. We anticipate that this course will not arise until there is sufficient evidence before us which would enable the renewed application and renewed submissions to be made. We will then be in a position to find the facts which are material to the submissions, and to rule upon the threshold application. I direct that a copy of this ruling be made available to counsel or advocates involved in the immediate hearing.

Consonant with our immediate ruling, the hearing subsequently proceeded to finality throughout the ensuing days of hearing. Miss Buckett, we record, with the leave of the Court, by arrangement informally withdrew as counsel following her threshold submissions, the association's case thereafter being conducted by Mr Robson.

There are certain aspects of the hearing which we now conveniently refer to. Firstly, we comment that, during the presentation of the applicant's case, while Mrs Denford, as the first witness called in support thereof, was being cross-examined by Mr Robson she admitted that she had surreptitiously taped, upon a tape recorder hidden in her handbag, the investigative interview which she had at the association's office in Christchurch on 11 April 1989 with the two organisers of the union in Canterbury (Mr Trevor Warr and Ms Caroline Payne-Harker). Both organisers, we find, were wholly unaware of the taping of this interview during its occurrence.

The interview, we accept, extended over a period of one and a half to one and three-quarter hours. Mrs Helen Cole — who is a close personal friend of Mrs Denford, attended the interview with her and was aware throughout that the interview was being taped by Mrs Denford.

We infer that officers of the nurses association first became aware of this clandestine recording shortly prior to Mrs Denford confirming the existence of the tape recording during cross-examination by the association's advocate. Mrs Denford had not disclosed the existence of the tape recording during her evidence-in-chief, notwithstanding that she had given extensive evidence concerning the contended course and content of the interview.

After consulting the members, our developed approach that we adopted in this setting and advised counsel and the association's advocate we would adopt, was:

- (i) the tape recording, as the best evidence of this particular interview rather than the secondary evidence of it available through witnesses, should be made available by Mr Forbes to Mr Robson and Mr Brandts-Giesen so that the taped interview could be heard by them informally during the hearing — but not, initially, as part of it — together with a copy of the available transcript of the tape which we were subsequently informed had been prepared by the Denfords' solicitors;
- (ii) the tape recording should be exhibited in due course as part of the evidence at the hearing, following Mr Denford's evidence which would confirm the accuracy of the tape, he having provided the tape recorder to his wife, explained its usage to her and subsequently caused the actual recording to be made available to the Denfords' solicitors; and
- (iii) the Court, counsel and the advocate would, at the conclusion of the oral evidence adduced during the hearing, hear the tape and exercise the opportunity of checking it against the prepared transcript.

We characterise our approach as a "developed" approach because we became subsequently aware, after hearing initially that the interview had been taped by Mrs Denford, that, in fact:

- (i) only the first 40 minutes of the interview had been so taped, the entire interview occupying, we now re-emphasise, about one and a half to one and three-quarter hours; and
- (ii) the recording of that part of the interview actually recorded was an imperfect recording, in material respects, as would be apparent upon listening to the tape and comparing it to the transcript thereof which had been prepared by the Denfords' solicitors.

Consonant, we confirm, with the course which we directed should be followed, this course, without objection from counsel and/or the advocate, was in fact followed. We now confirm that, at the close of the oral evidence at the hearing, the Court, counsel and the advocate heard the tape — exhibit "AA" — as part of the evidence heard during the hearing and we were then able to confirm the accuracy and/or otherwise of the prepared transcript. The tape recording was and is part of the material evidence adduced during the hearing. Given that the recording is incomplete and imperfect in material aspects, through defects in sound reproduction, the recording, we observe, is, in a qualified way only, the best evidence of what was said during this important investigative interview. The weight, of course, which the Court attaches to the recording in an evidentiary setting, we having admitted the recording in evidence pursuant to section 303(1) of the Labour Relations Act, was and is an issue for us to determine. We shall, we now confirm, subsequently enlarge upon our material findings and assessment of this particular interview. For completeness, we now comment that Mrs Denford, through her counsel, waived any issue of contended legal privilege concerning the recording.

Immediately before the tape was introduced in evidence we formally ruled, so that there could be no misunderstanding as to the evidentiary purpose of the recording, as follows:

It is my intention at this stage, as I indicated to counsel in Chambers this morning, to play the tape in open Court. We will each have a copy of the transcript. The tape has been identified by Mr Denford and will be assigned an exhibit number ("AA").

I wish to simply state, so there is no doubt as to the purpose for introduction of the tape, that essentially it comprises the best evidence to the extent it is apparent and clear as to what was said on 11 April. I well recognise in this case, having heard the tape described in advance, that it comprises only

30 minutes of the discussion and that, furthermore, there are significant difficulties with the sound quality in it and it is less than a complete account, even while it was operating. I am told this is the position by Mr Forbes, who addressed me earlier, for reasons relating to the reproduction/transcript of the tape, given that it was in a handbag. We will receive the tape in evidence as evidence but, of course, subject, to the extent we rely upon it, to the view we take of it, extending, of course, to its acknowledged incompleteness and the imperfections in a recording sense. We shall only rely on the transcript to the extent that we believe weight may be attached to what is recorded there, having regard not only to the tape but to the evidence which we have heard and the evidence, of course, from several witnesses is their account of the entire conversations that occurred. We recognise that something may be referred to in the tape which was qualified or re-appraised at a later stage of the discussion, which we are told extended over a period of up to 1¾ hours. We simply regard the tape as part of the evidence to be considered and to be given such weight as we consider appropriate, having regard to other evidence concerning the account of what occurred during that extended conference. We will play the tape at this stage as part of the public function of this Court and as part of the evidence produced during the hearing.

After hearing the tape, Mr Brandts-Giesen formally applied for the directed recall of Mrs Denford as a witness for further cross-examination by counsel for the board upon certain aspects of her evidence concerning the conference on 11 April 1989, given the contended variance between this evidence and the tape recording traversing part of the conference. Mr Robson was also heard upon Mr Brandts-Giesen's application, which Mr Forbes opposed. Having heard counsel and the advocate in this context, we declined to direct Mrs Denford's recall as a witness. In our ruling, however, we emphasised the course, in an evidentiary setting, which we would be taking concerning the tape. We ruled as follows:

Mr Brandts-Giesen, on behalf of the respondent board, has requested that the Court recall Mrs Denford to enable Mr Brandts-Giesen to cross-examine her upon certain aspects of the tape (exhibit "AA") which was exhibited to the Court and which we have played this afternoon, checking it against the transcript. The tape, of course, comprises about 40 minutes of the interview which occurred on 11 April 1989 at a meeting between Ms Payne-Harker and Mr Warr, for the second respondent, and Mrs Denford and Mrs Cole.

Mr Forbes confirms that he is opposed to this course and has indicated that, if the Court granted leave for Mrs Denford to be recalled for cross-examination upon what was said in the course of the taped discussion, Mr Forbes would certainly require that other witnesses present at that interview, namely Mr Warr and Ms Payne-Harker, be recalled, extending possibly to certain of the board witnesses, for cross-examination.

The view that we take is that the tape is in evidence and that — as an aid to credibility to the extent that we so use it in this case — we, the Court, are able to discern differences in account between the evidence we have heard from differing witnesses and the content of the tape. We do not consider it appropriate at this late stage to direct, in the face of opposition by any party, their recall for the purpose of further cross-examination. We, of course, will be closely considering in this case, the credibility of all witnesses where a conflict of evidence exists.

It is open to counsel to address us upon any matter of conflict in counsels' closing submissions. This right, of course, also extends to Mr Robson. I comment that Mr Robson has confirmed that, provided he has this right — and we have confirmed he does — he does not require Mrs Denford or any other witnesses to be recalled for further cross-examination.

In our view the interests of justice will be best served by declining, subject to what we have said by way of summary, the recall of any witness for further cross-examination.

Secondly, we now comment upon certain aspects of the evidence adduced during the present hearing, which we find it unnecessary to closely particularise. We have exercised, we record, our wide discretion pursuant to section 303(1) of the Act, concerning the admission of evidence. The weight, if any, which we attach to evidence adduced which is not technically legally admissible, is an evidential issue for the Court to evaluate. We shall not refer to this issue further in our judgment, except to the extent that we consider it necessary to explicitly do so.

Thirdly, we comment that during this particular hearing which continued over six extended sitting days, we heard, during the presentation of the cases for the respective parties, both in the leave setting and upon the merits, evidence in very considerable depth. We have, we comment, closely and reflectively considered the evidence in its entirety, notwithstanding that we shall not, of course, subsequently explicitly traverse the evidence fully. We shall adopt the same explicit course, we confirm, in relation to the detailed submissions which we have heard. We confirm that the Court deliberated throughout Saturday, 19 August 1989, concerning the hearing and all issues materially associated with it.

We now conveniently turn to the material background and facts to Mrs Denford's application for leave and her contended personal grievance against the board.

#### The Material Background and Facts:

Mrs Denford, we accept, following training, became a registered nurse during 1976. She has thereafter, we find, acquired sustained working experience in the profession in the public hospital system in Christchurch, and including two years' service in the Royal Brisbane Hospital, Brisbane, Australia. Mrs Denford's continuing service as a registered nurse has been broken only by maternity leave. She (Mrs Denford) has three children, namely twins — a son and a daughter — aged 9 years, and a younger daughter aged 2½ years. Mrs Denford's husband is employed, we find, in Christchurch as a fleet controller for the Freightways Group having, we infer, until 1988 been in business on his own account in the transport industry.

During 1987/88, upon a continuing basis, Mrs Denford was employed as a senior part-time staff nurse by the Canterbury Hospital Board at the Christchurch Public Hospital undertaking nursing duties on two nights of each week, namely Saturday and Sunday nights until, during January of 1989, this working regime was altered, upon Mrs Denford's application, to three nights weekly, the additional night duty being worked on Thursday night in each week. Saturday and Sunday night were worked, Mrs Denford deposed, as the staff nurse in charge of ward 12A, a surgical ward accommodating sub-acute patients.

We now comment briefly upon the impact of the night duty nursing regime undertaken by Mrs Denford during 1988, which she increased during January of 1989. This working regime was undoubtedly, we conclude, an ongoing experience of inherent considerable stress to Mrs Denford, combined as it was with other stress factors which she was then experiencing in her family situation. She (Mrs Denford), we find, was medically evaluated by her general practitioner, Dr A J Bartle, on 20 December 1988 because she was experiencing symptoms of dizziness when she "was moving around". Dr Bartle deposed that, following a clinical examination of Mrs Denford, he then concluded that she was suffering from stress. He (Dr Bartle) then knew that Mrs Denford, additionally to her mothering and family role, was undertaking night duty twice weekly at the Christchurch Public Hospital. He prescribed sleeping medication for her and urged her to take a holiday. Dr Bartle was aware of the financial pressures which the Denford family was then subject to, and the cumulative effect

upon Mrs Denford of pressure which she was then experiencing, both in her working and family situations.

There was, we accept, a residual tax indebtedness of \$16,000.00 which Mr Denford was obliged to pay to the Inland Revenue Department by two instalments which were payable on 7 January and 7 February 1989. The Denfords arranged, we accept, a second mortgage upon their then home at 9 Westby Street, Christchurch, securing in favour of the Trust Bank Canterbury, \$16,000.00. The purpose of this loan was, of course, to meet the tax liability then outstanding. The financial situation of the Denfords then demanded, we find, in an ongoing day-to-day sense, the introduction of constraints during January of 1989. Budgetary recommendations by the bank resulted, we accept, in the Denfords eliminating from their recurrent expenditure, certain components, including union fees payable by Mrs Denford as an assumed obligation of voluntary membership in the nursing association, a daily newspaper, and bin hire charges in a rubbish disposal setting. This reduction in recurrent expenditure was undertaken, we accept, in a budgetary control setting.

She (Mrs Denford) resigned her membership with the nurses association on 9 January 1989, for the purpose of saving ongoing membership fees of \$198.36 annually. The family's primary concern, we accept, was to meet its recurrent obligations upon the first — and now second — mortgage secured upon their home. Furthermore, Mrs Denford — most unfortunately we consider — felt constrained to increase by one-third the incidence of her night duty regime as a staff nurse, when she was not physically coping with the existing demands then being made upon her in a combined family and working situation/s.

A major problem confronting Mrs Denford, we find, was simply lack of sufficient sleep and/or rest upon a day-to-day basis. She deposed — acceptably to us — that an arranged day care child-minding arrangement concerning her youngest daughter had effectively not fulfilled its purpose of relieving Mrs Denford — given her night duty regime, particularly the increased working regime — from her maternal responsibilities towards this child. In the result, in colloquial terms, Mrs Denford was, upon an ongoing basis, simply "burning the candle at both ends", to her significant health disadvantage, through undertaking a demanding working regime, and also an incompatible significant child care role concerning her lively infant daughter. This immediate role, we conclude, was being undertaken when she (Mrs Denford) should have been sleeping, following night work, and, at the very least, effectively resting.

At a date which the evidence does not specifically confirm, but which we infer was probably during mid-February of 1989, the Denfords arranged for their youngest child to be cared for in a Dr Barnardos home in Christchurch, while her mother was working and subsequently sleeping/resting following her working experience. This arrangement, Mrs Denford deposed, relieved her of a great deal of the stress to which she had become intolerably exposed during — more particularly — January of 1989, when her working regime had been increased. She (Mrs Denford) then earned a net fortnightly wage of \$812.00. Mrs Denford recognised, during her evidence, that she was still subject, we comment, to stress in her combined working/family situations, but at a level, following the placement of the Denfords' youngest child in the Dr Barnardos home which she (Mrs Denford) could effectively manage and cope with. We simply paraphrase the effect of Mrs Denford's evidence in this immediate context.

We now turn to the material events which led to Mrs Denford's dismissal by the board on 21 March 1989.

A man aged approximately 70 years, namely a Mr Youngman, was, we find, a patient in ward 12A at the Christchurch Public Hospital on 29 January 1989 recovering from surgery concerning a perforated duodenal ulcer. He (Mr Youngman), we accept, had previously been treated as an in-patient at the hospital and was, we find — in our reliance upon the evidence of Enrolled Nurse Armstrong — then, that

is to say on 29 January, in the third day of his post-operative care. Mr Youngman, we accept, as Mrs Denford deposed, had a previous known history of alcoholism. We suppressed this fact at the hearing. He (Mr Youngman), we further accept, in a patient care setting, was, during the early morning of 29 January 1989, confused, disorientated and very physically restive. We find, as Mrs Denford and Nurse Armstrong commonly confirm, that he (Mr Youngman) attempted to get out of his bed. He was, as Nurse Armstrong expressed the situation which she observed "trying to climb over his bedrails and also pulling at his intravenous drips".

We conclude that Mr Youngman was, in fact, in his then state, a potential danger to himself as Mrs Denford deposed. As the staff nurse immediately in charge of the ward, she (Mrs Denford) had effectively remedial options then available to her, if she felt unable, with nurse Armstrong's assistance, to settle Mr Youngman down, by purely "nursing" means. Firstly, she could, in a nursing setting, have called in her night supervisor (Mrs Jackie Powell). Secondly, if she was so minded, she could have called for assistance and advice from the senior night supervisor, Sister Van Hassell. Thirdly, if sedation of Mr Youngman, in Mrs Denford's experienced opinion, was necessary as a means of settling him, her known duty, was simply to call in a house surgeon/doctor then on duty, to administer a sedative, or secure, through an appropriate telephone call, verbal authorisation — which would be subsequently authenticated in charted form — from a house surgeon/doctor, after appropriate informed consultation with him/her, to administer a prescribed drug.

Inarguably, we comment, as Mrs Denford well knew, it was and is a fundamental precept of nursing, that nurses, upon their personal initiative — except in circumstances of extreme emergency concerning a patient, and certainly the circumstances then affecting Mr Youngman were plainly not of this character — do not prescribe medication for patients under their care and/or exercise a diagnostic role concerning patients then under their nursing care. We are, we now stress, speaking of fundamental known precepts of nursing, to which the chief nurse for the board (Mrs Brenda Wilson), wholly acceptably to us, deposed.

She (Mrs Denford) candidly acknowledged under cross-examination by Mr Brandts-Giesen, that she knew Mr Youngman was "seriously ill"; that doctors who were physically then available to her, if required, were on duty, and just "two or three minutes away", and that her night supervisor could readily have been called upon for informed assistance and advice in the nursing management of Mr Youngman, if Mrs Denford had elected to call upon Mrs Powell. Furthermore, she (Mrs Denford) candidly acknowledged to counsel, that she could readily have got authority for any settling injection for Mr Youngman if in the prescribing doctor's opinion, this course, namely of medication, given Mr Youngman's medical condition and potentially damaging restiveness, justified this course. The charting of medicine, Mrs Denford acknowledged to Mr Brandts-Giesen, was, and is, in a hospital setting, founded upon a doctor's prescription/authorisation in charted verified form.

Notwithstanding her experienced awareness of this fundamental precept of nursing — that is to say that doctors, not nurses, prescribe medicine — Mrs Denford, in known breach thereof, administered without authorisation, 5 mg of phenergan to Mr Youngman. She (Mrs Denford) — and only she, we stress — was, and is able to confirm the quantity of the drug actually administered. Notwithstanding that she (Mrs Denford) deposed that Enrolled Nurse Armstrong was both aware and an approving participant, when this very modest quantity of the drug was administered, Nurse Armstrong, absolutely denies that this was so. We prefer, in this setting, the evidence of Nurse Armstrong, rather than the evidence of Mrs Denford. We find, in fact, that she (Nurse Armstrong) neither knew, nor participated, nor was approvingly present, when Mr Youngman was injected. We accept Nurse Armstrong's evidence that she was subsequently told by Mrs Denford of the drug's administration after it had occurred. She (Nurse Armstrong), we accept, deposed that Mrs Denford informed her that she had administered 5 mg of phenergan to Mr Youngman "to settle him".

She (Mrs Denford) — unacceptably to us — contends that Mrs Armstrong physically checked the measured dosage, namely 5 mg, in the insulin syringe, after Mrs Denford withdrew this very modest quantity of phenergan from an ampoule. Nurse Armstrong — wholly acceptably to us — denied that she participated, in any way, in the administration of this drug to Mr Youngman. We now re-emphasise that we prefer Nurse Armstrong's account of how she learned of the drug's injection, namely through disclosures made to her by Mrs Denford.

In a causation setting, namely the almost seemingly immediate effects of the drug upon Mr Youngman, we have reservations as to whether 5 mg only of phenergan were administered, as Mrs Denford deposes. We feel, however, upon the evidence, that we must resolve those reservations in Mrs Denford's favour. Having seen and heard her, we find, to a standard of probability, that 5 mg only, as she deposed, were administered to Mr Youngman by intra-muscular injection.

Phenergan, we accept, is certainly not a powerful sedating drug. We adopt, in this setting, the commentary in exhibit "X", the "New Ethicals Compendium", which (inter alia) provides:

- (i) "USES: Actions: A potent long-acting anti-histamine with additional anti-emetic and sedative/calming properties. ..." Furthermore, as is apparent from the text, the drug may be used in a qualified way/dosage, "as a paediatric sedative", that is to say a sedative for children; and
- (ii) "WARNINGS AND PRECAUTIONS:" The following text occurs, namely "Ambulant patients receiving PHENERGAN for the first time should not be in control of vehicles or machinery for the first few days until it is established that they are not hypersensitive to the central nervous effects of the drug and do not suffer from disorientation, confusion or dizziness. ..."

Mrs Denford deposed that she administered this drug to Mr Youngman, in the material circumstances confronting her, because she considered that the injection was medically appropriate. In so observing, she, of course, was exercising — as we conclude she well knew — a prescribing function concerning the drug which was not within her authorised province, and was quite contrary to the fundamental precept of nursing practice and ethics, to which we have earlier referred.

Indeed, Mrs Denford contends that the unauthorised administration by her of this drug occurred because of her mental and physical malaise, namely the oppressive grip of intolerable stress she was then experiencing, associated with the financial and other pressures in her family situation and her quite overpowering and debilitating sense of physical tiredness. In short, she (Mrs Denford) — we paraphrase her evidence — contends that she was then in a state of quite severe reactive depression through the cumulative effects of the several factors impacting upon her which we have earlier summarised. She thus contends that she was consequentially mentally and physically disabled from meeting the high nursing standards which have characterised her sustained past nursing practice.

Mr Youngman, following the administration of the drug, became very disturbingly "still", or "flat", in terms of his observed physical state. His apparent condition, extending to ascertainable "left-sided weakness", was such that Mrs Denford, as the staff nurse in charge of ward 12A, promptly called in the surgical registrar, Dr Gregory Robertson, who was about to go home after operating through the night. Dr Robertson, we accept, was familiar with Mr Youngman as a patient. It was then, we now emphasise, in the early hours of the morning of 29 January. Dr Robertson, at Mrs Denford's request we find, closely examined Mr Youngman. He found that Mr Youngman was "deeply unresponsive", but that his blood pressure and pulse were stable. Dr Robertson deposed that, in his opinion, and consistently with Mr Youngman's prior medical history — he having previously experienced a stroke — his then determined condition "was consistent with that", that is to say



consistent with the conclusion the doctor formed that Mr Youngman probably had experienced a "minor stroke".

He (Dr Robertson) deposed that he had not turned his mind, before giving evidence in the immediate hearing, to the material events as they had occurred on 29 January 1989 until required by the board, as a potential witness, to do so shortly prior to the hearing. In short, over seven months had then elapsed, we find, before Dr Robertson, as a potential witness, was required to recall what had materially happened. Notwithstanding this circumstance, we are satisfied that he (Dr Robertson) has accurately deposed that:

- (i) he asked the nurses who attended him — although he was uncertain as to whether there was one or two nurses in attendance — he believing there were two, whom he could not now identify — whether "any medication had been given" to Mr Youngman; and
- (ii) he (Dr Robertson) was informed that "none had been" so given.

We comment that under cross-examination by Mr Forbes, Dr Robertson re-emphasised that he did ask this question of the nurse or nurses in attendance, he describing his recollection, as "I am clear on that".

Dr Robertson, during his evidence, confirmed the imperative importance of a doctor diagnosing a patient's condition, in a hospital setting, of being advised accurately and fully by nursing staff, of what medication the particular patient concerned, had received. We conclude that this knowledge, in a diagnostic setting, may "be a life or death issue". Dr Robertson, in paragraph 5 of his brief of evidence, expressed, as it seems to us, this unanswerable opinion, namely:

It is essential for a doctor diagnosing a client's condition or the deterioration of a client's condition, to know exactly what medication that patient has received. A diagnosis can be affected if a doctor does not know that a person is under a sedative like phenergan.

He (Dr Robertson) in paragraph 4 of his brief, also commented upon phenergan, and its usage at the Christchurch Public Hospital, as a sedating drug, in these terms:

Phenergan is a sedating drug. It is used sometimes to assist sleep but it is not my practice or the practice of the House Surgeons I knew to be on the ward at that time to prescribe Phenergan.

Mrs Denford was quite emphatic during her evidence, that Dr Robertson did not ask her, or Nurse Armstrong, whom she contends was present throughout, whether Mr Youngman had been given any medication. We prefer the evidence of Dr Robertson in this context. We are quite satisfied that Mrs Denford untruthfully informed the examining doctor, in response to his specific question, that no medication had been administered to the patient. We conclude that Mrs Armstrong was probably present, and said nothing in response to Dr Robertson when this particular question was asked by the examining doctor, notwithstanding that she (Mrs Armstrong) cannot now specifically recall Dr Robertson putting this material question to her and Mrs Denford.

Mrs Denford deposed that she did not volunteer — the emphasis is ours — information to Dr Robertson concerning the Phenergan injection. She, in fact, we find, specifically and untruthfully, provided misinformation to the doctor. In short, she told him that no medication had been given to Mr Youngman. Mrs Denford attributed her failure to volunteer information to Dr Robertson, to the following factors, namely:

- (i) "I felt at the time physically and mentally compromised, and could not see my way out of the situation"; and
- (ii) "I felt I was not responsible for the patient's condition", because the injected quantity of Phenergan was very small.

Plainly, we comment, this was not an instance where "silence is golden". Mrs Denford's explanations in this immediate setting, are sadly exposed, we conclude, upon reflective analysis, as self-justifying attempts to explain the breach of a fundamental obligation which she (Mrs Denford) as a nurse, plainly ethically owed—and which, we find, she knew perfectly well she owed—to Mr Youngman, the affected patient, and to Dr Robertson, the examining doctor, in the material circumstances which then confronted him.

This breach of her fundamental duty as a nurse, in the immediate context, is, we conclude, a very serious breach, for self-evident reasons, but which were cogently enlarged upon by informed medical witnesses, during the present hearing.

We now emphasise compassionately, that we are not insensitive and/or unsympathetic to Mrs Denford's personal situation as she disclosed it at the material time—we speak of her comprehensive malaise and reactively depressed state—but the dominating focus of our concern must, in the material circumstances, be Mr Youngman's situation, and that of Dr Robertson, who was consequentially endeavouring to diagnostically cope with an emergency situation. Mrs Denford, we conclude, deliberately withheld from Dr Robertson, information that was critically relevant, in our opinion, to the situation which he was then dealing with. We, as the Court, deeply regret the need to make these immediate findings, which we know will be very distressing to Mrs Denford. Unfortunately, our plain duty in the material circumstances of this case, is, we perceive, to make the findings we have made, given the unanswerable impact of the evidence, which compels us to the conclusions we have expressed.

Mrs Armstrong explained why she did not report Mrs Denford concerning the events of 29 January 1989 before she, in fact, formally reported what had occurred to her night supervisor, Sister Jackie Powell, on 13 March 1989.

The night supervisor then brought this report to the formal attention of the principal nurse (Nurse Diane Barnes) at the Christchurch Public Hospital, to whom Nurse Armstrong, following Nurse Barnes' telephoned invitation to her, then made a formal complaint on 15 March 1989. Nurse Armstrong attended upon Miss Barnes and was interviewed, concerning her complaints, over a period of about half an hour. This complaint, we recognise, extended also to the contended uncharted administration of phenergan on 13 March 1989 to an elderly/disorientated patient then in ward 12A, namely a Mrs Vette.

We now strongly emphasise that, to the extent that Nurse Armstrong complained specifically and/or generally of other instances of uncharted administration of phenergan by Mrs Denford to any other patient in ward 12A, except Mr Youngman on 29 January, we disabuse our mind completely of these unproven allegations. They are, in the fabric of this case, simply that, namely unproven allegations which Mrs Denford has at all material times—including the present hearing—absolutely denied. The complaint/s Nurse Armstrong made to Principal Nurse Barnes on 15 March, and the nature of those complaints, are part of the narrative of evidence in this case. Mrs Denford, however, admitted the administration of 5 mg of phenergan to Mr Youngman only, in the circumstances which we have earlier described. She was subsequently dealt with, through dismissal by the board for this single—the emphasis is ours—instance of administration of an uncharted drug, and the hearing before us has proceeded accordingly. The administration of phenergan to Mr Youngman was and is the only instance, we now re-emphasise, of an uncharted drug administration through intra-muscular injection, which caused the board to successively suspend and then dismiss Mrs Denford on 16 and 21 March 1989 respectively.

We, of course, in assessing the credibility of Nurse Armstrong and Mrs Denford, where their evidence is in material conflict, have taken into account, both broadly and

specifically, all aspects of their evidence, including the contentious issue of why Nurse Armstrong deferred, for a period of about six weeks, formally reporting Mrs Denford initially — upon a formal basis, we stress — to Sister Powell. We have also, in a credibility setting, taken fully into account those very strong criticisms which Mrs Denford made of Nurse Armstrong, both in her personal and nursing capacities. There was a strong suggestion in the evidence of Mrs Denford that Nurse Armstrong's complaints against her might have been actuated by malice, because of inter-personal difficulties which Mrs Denford had and was experiencing with Nurse Armstrong, both as her superior and in a personal relationship setting.

It will suffice for us to say that we find that Nurse Armstrong satisfactorily explained to us why she deferred making an official complaint concerning the uncharted phenergan injection by Mrs Denford to Mr Youngman on 29 January 1989. We also, in the fabric of the case, do not ignore that Nurse Armstrong, a few days after the incident, contends that she informed another named staff nurse of what had occurred and was then told by the nurse concerned — whose name we formally suppressed — that she (Nurse Armstrong) “must do something about it”. Nurse Armstrong, we recognise, deferred doing so for the reasons she advanced during her evidence, for a protracted period of time.

Nurse Armstrong, we note, has been an enrolled nurse since 1973. In the nursing hierarchy she was and is, of course, subordinate in standing to a registered nurse and, more particularly, Mrs Denford who was effectively, in her capacity as staff nurse, immediately in charge of ward 12A during her night duties within that ward. Mrs Armstrong confirmed that she also informed Sister Powell of the uncharted phenergan administration on two occasions. Mrs Powell, we now emphasise, promptly reported the position to the principal nurse at the hospital, following Nurse Armstrong's disclosures to the night supervisor on 13 March 1989.

She (Nurse Armstrong) very candidly acknowledged, under cross-examination by Mr Forbes, that Mrs Denford was, in her opinion, a committed and caring nurse of — we paraphrase her account — high nursing calibre. Nurse Armstrong emphasised that Mrs Denford was, she considered, “under a lot of stress after Christmas of 1988” and that “she became more stressed and then more stressed”. This evidence, we comment, is confirmatory of the stress factors which Mrs Denford was experiencing, and which we have earlier summarised, at the time of the uncharted administration of phenergan to Mr Youngman.

We momentarily digress to comment that Mrs Armstrong became a member of the nurses association during December 1988, and subsequently sought the association's assistance — through Ms Caroline Payne-Harker — following Nurse Armstrong's complaint to the principal nurse at the Christchurch Hospital on 15 March, because of anticipated difficulties which the making of those complaints would, in a repercussive sense, have upon Nurse Armstrong's continued working situation at the hospital. We simply now emphasise that Ms Payne-Harker knew, through the supportive role she exercised in relation to Nurse Armstrong's concerns in her work setting, of the substance of the complaints concerning Mrs Denford. This information, of course, was simply one source of information which Ms Payne-Harker had, at a relatively early stage, which was, of course, materially relevant to the contended grievance which Mrs Denford subsequently sought to bring against the board, through the association.

Principal Nurse Barnes interviewed Mrs Denford, by arrangement, on the morning of 16 March 1989. She (Mrs Denford) was required to attend upon the principal nurse at her office, but was not, we find, informed of why she was required to so attend. The principal nurse interviewed Mrs Denford concerning Nurse Armstrong's complaint/s of uncharted administration of phenergan. Mrs Denford admitted giving an uncharted injected dose of phenergan to Mr Youngman on 29 January 1989 for the professed purpose of “settling him down”. Mrs Denford, we further accept in our

reliance upon her recollection of the interview, particularised that she had administered 5 mg of phenergan only to Mr Youngman to settle him down, because he was "so confused and disorientated at the time as to comprise a danger to himself".

Mrs Denford emphasised during her evidence that, in her recollection, there was no discussion between herself and the principal nurse concerning the effect of giving phenergan to a patient and/or any discussion as to why she (Mrs Denford) did not subsequently tell the doctor on duty as to what she had done. Having heard the principal nurse, however, we accept that she (Miss Barnes) then knew from Nurse Armstrong that, following the administration of the uncharted drug, Mr Youngman had gone "flat" and shortly afterwards had required medical attention. We are satisfied — as Miss Barnes deposed — that she was very conscious, when she interviewed Mrs Denford, that the doctor who was called in to assess Mr Youngman, given his collapsed state, was not then told by Mrs Denford that she had administered by injection an uncharted dose of phenergan to Mr Youngman. In the context of the complaint made to the principal nurse, this was a very disturbing feature, we accept, of what had allegedly occurred. We are satisfied that she (the principal nurse) emphasised strongly this feature of the material events to Mrs Denford.

During her brief of evidence the principal nurse (inter alia) deposed:

2. On 15 March 1989 I received a complaint from an enrolled nurse concerning an incident involving Mrs Denford some time earlier. I learned that Mrs Denford had given a patient a Mr Youngman a dose of phenergan by way of injection in order to settle him down on the night of 29th January 1989. He had gone subsequently "flat" and had required medical attention.
3. For a nurse to give an injection it must be "charted" that is it must be prescribed by a doctor in writing. The nurse can then administer the injection. The syringe and needle go into a plastic container. This is because the needle is sharp and the glass will injure the person who cleans it up and seizes it. The nurse should then write on a patient chart that the drug has been given. This was not done for Mr Youngman. It is important for doctors and nurses to know what was done and when. Decisions can be made on the basis of facts. This is important for diagnosis and for treatment purposes. A nurse cannot give drugs unless they are charted by a doctor. Some wards allow a bit of leeway with aspirin or aperients but never injection. The worst feature is that the doctor who was called was never told.
4. I confronted Mrs Denford with this and she admitted it. I discussed with her the difficulties of the situation. She told me that she had been under particular stress with her husband and children. I told her that I regretted that but I could not trust her on her own anymore.

We accept, as the principal nurse deposed, that she "genuinely felt very sorry for Mrs Denford". She was conscious of her very good nursing record. She (the principal nurse) knew that Mrs Denford was very highly regarded as a nurse because of access to her personal file, and the commendable nursing evaluations therein expressed. Miss Barnes' compassion for Mrs Denford caused her, we conclude — as indeed she admitted under cross-examination by Mr Forbes — to seek out a compromise in relation to Mrs Denford's nursing future.

We have considered the evidence closely in this setting. Without particularising the ensuing discussion between the principal nurse and Mrs Denford in detail, we find that:

- (i) the principal nurse quite unambiguously informed Mrs Denford that the admitted state of affairs was very serious in a professional setting;

- (ii) Miss Barnes made it unmistakably plain to Mrs Denford that she (the principal nurse) felt she could no longer trust her in the immediate future to continue working unsupervised on night duty because of the risk that she (Mrs Denford) could give further unauthorised injections to other confused or disorientated patients; that she (Mrs Denford) might be required to come on to day duty under supervision, and could be required, through redeployment by the board, to work in future at another hospital, such as the Jubilee or Coronation Hospitals, under supervision;
- (iii) in response to Mrs Denford's specific question as to whether she (Mrs Denford) would be required to be under supervision for two or three years, she (the principal nurse) responded, in substance, "No, only about a year. You will not be punished forever";
- (iv) that she (Mrs Denford) was suspended by the principal nurse from 10.30 pm on the following Saturday night, which she (Miss Barnes) then altered to a suspension taking effect from 10.30 pm that night — Tuesday, 16 March — when Mrs Denford informed her that she was rostered to undertake night duty that evening;
- (v) she (Mrs Denford) was required to attend further upon Miss Barnes at 11.30 am on Monday, 20 March, when she (the principal nurse) "will tell you where we have decided to employ you and the conditions under which you will work in future", if a redeployment option was exercised by the board; and
- (vi) she (Miss Barnes) could give Mrs Denford no assurances as to her nursing future and, as the principal nurse particularised, the emphasis and content overall of her remarks to Mrs Denford in paragraph 5 of her brief of evidence:

In general terms I canvassed the possibility of day duty under supervision. I did not give her any promise that this would be done. I told her that in any event the decision was not mine and that I had to report the matter to the Board and to the Nursing Council. I told her that I did have sympathy for her but that she had not been straight with the doctor who was called to Mr Youngman. I told her that ultimately Dr Fairgray had the final say as to her future. I suspended her and referred the matter to the Chief Nurse of the Board. ...

We now emphasise our acceptance that the principal nurse informed Mrs Denford that she (Miss Barnes) provisionally considered that, despite the seriousness of the admitted situation, redeployment of Mrs Denford on day duty and under supervision, to another hospital operated by the board, was a future working possibility concerning Mrs Denford which the board would consider and might act upon in all the circumstances of the case and having regard to Mrs Denford's excellent credentials as a nurse. We accept that no assurance of future employment of Mrs Denford by the board, was given by the principal nurse to her, Miss Barnes stressing to Mrs Denford that "Dr Fairgray had the final say as to her future".

We accept that, in relation to Mrs Denford's suspension and then modified suspension, which was to take immediate advised effect, the principal nurse withdrew from her office, seemingly in the context of what later occurred for the purpose of advice. We infer — although the evidence was not explicit in this setting — that, on each of these instances of withdrawal by Miss Barnes — to which Mrs Denford deposed — the principal nurse sought and obtained specific advice from Mrs Brenda Wilson, the chief nurse for the board.

In our considered view, when Mrs Denford left the principal nurse's office on 16 March, she (Mrs Denford) knew that:

- (i) the principal nurse took a very serious view of her admitted uncharted administration of phenergan to Mr Youngman, which had led to her suspension;
- (ii) her future redeployment by the board was a possibility only, notwithstanding that the principal nurse had been encouraging in her emphasis that the board might, in fact, act upon this option of continued, but qualified, future employment of Mrs Denford;
- (iii) she (Mrs Denford), as an experienced nurse, was aware of just how inherently serious, in a professional setting, it was for a nurse to prescribe and administer an uncharted drug to a seriously ill patient under her care and then to withhold this information from an examining doctor closely investigating and evaluating that patient's subsequent collapsed state; and
- (iv) she knew that the nursing council was to be officially notified of what had occurred, and that Dr Fairgray — not the principal nurse at the Christchurch Public Hospital — would decide for the board the issue of Mrs Denford's future employment, if any, by the board, having regard to what had occurred.

Mrs Denford, we accept, subsequently communicated with the nurses association on 16 March 1989. She did so, we accept, upon the advice of Mrs Helen Cole, who is an experienced psychiatric nurse employed at Sunnyside Hospital. Mrs Cole, who is a close personal friend, we now re-emphasise, of Mrs Denford, is not a member of the association, but a member of the Public Service Association. Essentially, we conclude, Mrs Denford approached the association for the purpose of obtaining advice from it. She disclosed, we accept, at the outset of her discussion with Ms Payne-Harker, that she (Mrs Denford) was not a current member of the association, having resigned from it during January of 1989. She briefly explained, we accept, to Ms Payne-Harker why she had resigned, namely because of her financial crisis situation then confronting the Denford family. She (Mrs Denford) further explained, we accept, to Ms Payne-Harker the course of events of that day which had led to Mrs Denford's suspension, but possible redeployment by the board, in her working situation. Ms Payne-Harker, we find, made it unmistakably plain to Mrs Denford just how serious, in Ms Payne-Harker's view, was Mrs Denford's situation. Ms Payne-Harker emphasised that, in her opinion, if Mrs Denford was given the opportunity of redeployment, she should immediately accept it, because what she had done justifiably warranted her dismissal. She (Ms Payne-Harker) further emphasised, we find, that a matron in a rural hospital had been dismissed for less, meaning a breach of nursing standards of less inherent seriousness than that which Mrs Denford had admitted to the principal nurse.

In this telephone conversation, we conclude, Mrs Denford wished to know if the association could effectively assist her — the emphasis is ours — if she rejoined the association. Ms Payne-Harker, we find, emphasised that in the disclosed circumstances, even if Mrs Denford was a current member of the association, it might not be able to actually assist her because of what had happened. This, we accept, was simply said to re-emphasise Ms Payne-Harker's view concerning the seriousness of Mrs Denford's position. During this conversation, we accept, Mrs Denford impressed Ms Payne-Harker as saying, in effect, "I will rejoin the association, if you will assure me it can effectively assist me". Ms Payne-Harker was understandably, we comment, not receptive to her perception of Mrs Denford's approach towards the association, and her possibly renewed membership in it. Mrs Denford, for her part, considered that Ms Payne-Harker was abrupt and unsympathetic to her disclosed position. She believed that this lack of sympathy was occasioned primarily because she (Mrs Denford) had earlier resigned from the association, for reasons which Ms Payne-Harker regarded as inappropriate and unacceptable. We conclude that, to a significant extent, the two women were speaking at cross purposes, through a misunderstanding of the then expectations of each. We accept that Ms Payne-Harker suggested to Mrs Denford that she should rejoin the association, but was unreceptive to

Mrs Denford's expressed, but qualified, willingness to rejoin if Ms Payne-Harker could, in effect, assure her that the association could and would effectively — the emphasis is ours — assist Mrs Denford. Ms Payne-Harker, we find, was unprepared — and understandably so in the circumstances — to give Mrs Denford the form of assurance, in emphasis, that Mrs Denford seemed to require of her.

Ms Payne-Harker, we accept, requested Mrs Denford to inform her on 20 March 1989 of the course and outcome of the arranged meeting between Mrs Denford and the principal nurse. Mrs Denford agreed that she would do so.

During this discussion between Mrs Denford and Ms Payne-Harker — we accept — as Ms Payne-Harker deposed, that she (Ms Payne-Harker):

... made it clear to her what the legal obligation was on the Union, that even though she joined, the Union was not obliged to do any more than look at the substance of her grievance and make a decision as to whether it would take it beyond that. I told her that there were occasions where the Union would decide not to take a Personal Grievance on behalf of a member.

She obviously did not like what I was saying. There was no doubt in my mind that Mrs Denford was fully aware of and understood the Association's position. By not joining on my advice she had refused to accept that position.

On 16 March Mrs Denford received a delivered letter, signed by Dr Fairgray, the acting associate general manager — patient care, which was produced to the Court as exhibit "D", and which is quite explicitly plain in its terms, namely:

"PERSONAL"

16 March 1989

Staff Nurse I.M. Denford,

Ward 12A,

CHRISTCHURCH HOSPITAL.

Dear Miss Denford, (sic)

SUSPENSION FROM DUTY

I have been advised by the Principal Nurse of Christchurch Hospital that she wishes to investigate some of your actions with respect to the care of patients committed to your care.

In terms of my delegated authority from the Acting General (sic) to suspend or dismiss employees for grave misconduct or neglect of duties, or for acting in a manner which renders the employee liable to dismissal, I now confirm that your suspension, as from 10.45 p.m. tonight, becomes effective. This suspension is on the basis of ordinary pay.

I advise that you have the right to have your suspension reviewed if you make such a request in writing.

Yours sincerely,

(Signed)

R.A. Fairgray

ACTING ASSOCIATE GENERAL MANAGER — PATIENT CARE

cc: Chief Nurse, C.H.B.

Personnel Manager, C.H.B.

Acting General Manager, C.H.B.

We simply now emphasise that this letter expressly, in its context, refers to "grave misconduct" and to "acting in a manner which renders the employee liable to dismissal, ...". We are satisfied that Mrs Denford knew, from a reading of that letter — the letter being unmistakably plain, we now emphasise — that her future employment by the board was then at very grave risk. We frankly do not accept Mrs Denford's contention to the contrary, namely her evidence that "I was aware that the letter of 16 March expressed the possibility of dismissal, but it did not register with me

because I understood the meeting on 20 March was to discuss my redeployment". Every word of exhibit "D", we conclude, would and did register with Mrs Denford, given the seriousness, to Mrs Denford, of the matters dealt with in that letter. We find, in fact, that she did know from exhibit "D" that her future employment by the board was seriously at risk, and that the pending meeting on 20 March was — and would be — critical to her future employment situation.

On 17 March Mrs Denford, we find, was informed by the secretary for the principal nurse (Miss Barnes) for the Christchurch Hospital, that the meeting for Monday, 20 March, would now take place at the office of the chief nurse for the Christchurch Hospital Board (Mrs Brenda Wilson). Mrs Denford was then given specific instructions concerning the location of the chief nurse's office. We comment that this change of venue for the meeting would — and, we find, in fact did — reinforce, in Mrs Denford's mind, the importance of the meeting in an employment setting. She now knew that the chief nurse for the board had become involved, as was Dr Fairgray. Mrs Denford, we find, also knew that possible redeployment was only one exercisable option which the board might resort to concerning her future employment, and that an equally obvious but other option was her dismissal by the board for "grave misconduct" as a nurse, a possibility, in our view, unmistakably plainly expressed in Dr Fairgray's letter of 16 March.

The chief nurse for the board (Mrs Wilson), we find, telephoned Ms Payne-Harker on Friday, 17 March, and advised her that she (the chief nurse) would be attending the meeting on Monday, 20 March, which would be attended by Mrs Denford and that:

- (i) the matters in issue were being treated as very serious by the board; and
- (ii) the issues would be referred to the nursing council.

Ms Payne-Harker, upon the chief nurse's enquiry, we find, told Mrs Wilson that she (Ms Payne-Harker) would not be attending the meeting on 20 March because Mrs Denford was not a member of the association.

Ms Payne-Harker deposed that Mrs Denford telephoned her on 17 March and asked Ms Payne-Harker to attend the meeting on 20 March with her. This call was received, Ms Payne-Harker confirmed, after she had spoken to the chief nurse. There is, we comment, irreconcilable conflict in this context between Mrs Denford on the one hand and Ms Payne-Harker on the other, concerning this telephone conversation. Mrs Denford deposed it simply did not occur. Ms Payne-Harker, to the contrary, was and is adamant concerning the occurrence of the telephone call on 17 March upon Mrs Denford's initiative, and also concerning what was said in the course of the ensuing conversation.

We prefer the account of Ms Payne-Harker in this setting, rather than the contrary account of Mrs Denford. In this context we recognise that Mrs Denford contends that she did have a telephone discussion with Ms Payne-Harker on 20 March, following the meeting in the chief nurse's office. Ms Payne-Harker — acceptably to us — contends that no such telephone call and ensuing discussion in fact took place upon the initiative of Mrs Denford, with Ms Payne-Harker. We immediately acknowledge that Mrs Cole deposed that, unbeknown to Ms Payne-Harker, she (Mrs Cole) overheard this entire conversation on 20 March — which she quite emphatically deposed occurred on that date, but which Ms Payne-Harker denies — because she (Mrs Cole) was listening, by arrangement with Mrs Denford, on an extension telephone within Mrs Denford's home. We reject as unreliable — for reasons we shall subsequently enlarge upon — Mrs Cole's evidence in this immediate setting. More specifically, we conclude that Mrs Cole's evidence in this setting is untruthful. It is the case for Mrs Denford — supported by Mrs Cole — that, during the alleged conversation upon Mrs Denford's initiative, which occurred on 20 March — but which we are satisfied



simply did not take place — the content of that discussion was, with minor modification, the content of the discussion which we find, in our reliance upon Ms Payne-Harker's evidence, in fact occurred on 17 March.

These immediate contentious issues — upon which we prefer the evidence of Ms Payne-Harker — are of very significant importance because of what, we find, Ms Payne-Harker told Mrs Denford concerning the proposed meeting in the chief nurse's office, then scheduled for 20 March.

Ms Payne-Harker, we accept, declined Mrs Denford's request which was expressed to her on 17 March to accompany Mrs Denford to the meeting at the chief nurse's office on the following Monday. She (Ms Payne-Harker) declined to do so, we accept, for the expressed reason that Mrs Denford was not then a union member. Ms Payne-Harker told Mrs Denford, we find, what the chief nurse had said to her concerning both the seriousness of the issues under consideration and that those issues would be reported to the Nursing Council. Ms Payne-Harker, we accept, as she deposed, informed Mrs Denford of the possibility of her deregistration as a nurse by the council as a result of this formal reference. Mrs Denford, we accept, was very upset by what Ms Payne-Harker told her. We firmly conclude that, given the information which Ms Payne-Harker then imparted to her, Mrs Denford was, in the result, effectively advised — yet again — of the seriousness of her position both in employment and nursing registration settings. More particularly, we accept that Ms Payne-Harker told Mrs Denford that the outcome of the meeting might, in fact, be Mrs Denford's dismissal. Ms Payne-Harker, we further accept, re-affirmed her previous advice to Mrs Denford, namely that she (Mrs Denford) should communicate to Ms Payne-Harker the outcome of the meeting on 20 March. Ms Payne-Harker, we accept, advised Mrs Denford, given that she was not a union member, to consider having legal representation at the meeting.

Mrs Denford, we find, elected to attend the meeting on 20 March without legal representation. During the weekend, 18/19 March, Mr and Mrs Denford secured written testimonials from three nurses whom Mrs Denford had relatively recently worked with in the Christchurch Public Hospital. We refer in this context to exhibits "11(a)", "11(b)" and "11(c)", which are respectively dated 20 March and 18 March. Each of these testimonials have been formally "declared" before, we comment, three different Justices of the Peace. Obviously, purposeful application was exercised in this context by the Denfords to have these testimonials prepared and declared, given the very limited time available to them during the weekend of 18/19 March. Mrs Denford and her husband deposed that the purpose of these testimonials was to satisfy the board that nothing untoward had happened, for which Mrs Denford was accountable, in a patient care setting while she worked with the experienced nurses who were the authors of the testimonials concerned.

On Sunday evening — 19 March — Mr Denford took the initiative, using a speaker telephone facility at the Denford home, of telephoning the Denfords' solicitor, Mr John Woodward of Duncan Cotterill, solicitors, Christchurch. Mr Denford and his wife sought legal advice from Mr Woodward concerning the meeting scheduled for the following day, 20 March. In short, the advice essentially sought was whether Mrs Denford required legal representation or not at this particular meeting.

Notwithstanding we find that Mr Woodward did not, during his evidence, have a precise or full recollection of the telephone discussion he had — essentially with Mr Denford — he (Mr Woodward) concluded, on the basis of what Mr Denford told him, that it was not necessary for Mrs Denford to be legally represented at the forthcoming meeting or, in the alternative, to have the meeting adjourned so that legal representation of an informed character could be arranged with Mr Woodward's firm for her, at a deferred meeting. Mr Woodward, we infer, does not, in his firm, practise as counsel but in commercial law and related settings. Mr Woodward understood from Mr Denford that the purpose of the meeting on 20 March was to discuss and

conclude Mrs Denford's intended redeployment in another area of the hospital where she was working because — essentially — of some interpersonal difficulties which she (Mrs Denford) was experiencing with another nurse. Mr Woodward became aware in the discussion — as he now expressed the position outlined to him — that Mrs Denford had administered a drug to a patient "contrary to orders". The issues, as presented to Mr Woodward, were, we conclude, very significantly understated and/or minimised by Mr and Mrs Denford. Mr Woodward was not, we find, told that Mrs Denford was then under suspension from her employment and/or why she was under suspension. The prospect of her dismissal was not, we find, discussed at all with Mr Woodward as a possible sequel, in a disciplinary setting, to the meeting she was to attend on 20 March upon the board's initiative. Dr Fairgray's letter was not read to Mr Woodward. Indeed, neither Mr Denford and/or his wife even referred to this letter (exhibit "D"). Mr Woodward was oblivious of the existence of the suspension letter addressed by Dr Fairgray to Mrs Denford on 16 March. Indeed, Mr Woodward confirmed, under cross-examination by Mr Brandts-Giesen, that, if he had been aware of exhibit "D", his advice to the Denfords "would have been quite different".

Mr Woodward advised the Denfords to attend the meeting on 20 March without legal representation because he considered, on the basis of what he had been told by them, that legal representation of Mrs Denford was not protectively necessary to safeguard any threatened interest affecting her which rendered her vulnerable, either in relation to her employment by the board and/or her nursing registration.

We consider it was — and is — most unfortunate that the Denfords — and more particularly Mrs Denford — did not fully and frankly inform Mr Woodward of the situation in fact then confronting Mrs Denford. In the result, Mr Woodward, we conclude, in an advisory role — which was the very purpose the Denfords had consulted him — was misled by their failure to be sufficiently frank with him concerning the material background to, and purpose of, the meeting on 20 March.

We simply emphasise at this juncture that the Denfords were clearly sufficiently concerned by the prospect of the forthcoming meeting at the chief nurse's office to discuss with their solicitor on Sunday evening, the need, or otherwise, in his view, for legal representation of Mrs Denford at that meeting. Most unfortunately, we now observe, they — the Denfords — withheld material facts from Mr Woodward which effectively disabled him from appropriately advising them. In short, Mr Woodward's advice proceeded upon a misappreciated view of the facts because — most unreasonably, we consider — the Denfords did not objectively recount to him the known material facts of which they — and more particularly Mrs Denford — were keenly aware.

Mr Denford, in fact, accompanied his wife to this meeting which was held in the chief nurse's office. Mr Denford was present throughout. Dr Fairgray was present at the meeting. He confirmed to the Denfords that his role was to protect the consumer, referring to his protective primary position in a patient care setting for the board. The chief nurse effectively, we accept, chaired this meeting. Dr Fairgray nonetheless, we conclude, fully participated in the discussion.

The Denfords described their approach and attitude, in an anticipatory sense, towards this meeting. Mr Denford deposed that "we felt no anxiety about the possible loss of Mrs Denford's job" because the Denfords, he contended, understood the meeting would focus upon the issue of redeployment of Mrs Denford. In the material circumstances, reasonably evaluated, we find this contention by Mr Denford very unconvincing. We reject it. Mrs Denford, under cross-examination by Mr Brandts-Giesen — adopting affirmatively the question counsel put to her — contended that "I am saying I was blissfully unaware that I was looking a dismissal straight in the eye. I was told by Miss Barnes I would be redeployed". This contended attitude impresses us also as being, in the material circumstances of which Mrs Denford was only too

painfully aware, quite unreal. We reject that this professed attitude by Mrs Denford towards the meeting was genuinely entertained by her. The meeting was conducted informally. The Denfords, Chief Nurse Wilson and Dr Fairgray were all seated in easy chairs. The events in question were discussed. An avowed purpose of the meeting, as outlined by Mrs Wilson, was to establish, materially, what had occurred. Essentially, we conclude, the same factual situation emerged through the discussion as had been disclosed by Mrs Denford to Principal Nurse Barnes. There was nothing, we conclude, that was inherently unfair in the interview situation.

The meeting, we comment, was being held against a known background of admitted facts by Mrs Denford, which concerned a patient of the board, Mr Youngman. Mrs Denford, as she was painfully aware, was under suspension because of what had occurred in circumstances for which she was plainly accountable as a nurse in ward 12A at the Christchurch Public Hospital on 29 January 1989.

Mrs Denford was given, we consider, the full opportunity of explaining why she had acted as she did, extending to the furnishing of any explanation she wished to make as to why the administration of the uncharted drug was not disclosed by her to Dr Robertson when he subsequently attended Mr Youngman shortly after the administration of the uncharted dose of phenergan when he (Mr Youngman) was in a disturbing collapsed state. In short, Mrs Denford, we conclude, was fully heard by the chief nurse and Dr Fairgray, extending to her indisputably excellent nursing credentials.

The Denfords, we conclude, both knew that a primary purpose of the meeting was to determine how Mrs Denford should be dealt with for what had occurred. When the seriousness of the position was emphasised by Dr Fairgray and also independently by Chief Nurse Wilson — extending to the observations that not only was it a dismissable offence but could also result in the loss of Mrs Denford's nursing registration through the Nursing Council — Mrs Denford, we accept, then raised the exercisable option of her redeployment by the board. Dr Fairgray commented, we accept — as the Denfords each deposed — that in substance this might be a "reasonable" or "sensible" option.

Mr Denford, we accept, made available to Chief Nurse Wilson the testimonials comprising exhibits "11(a)", "11(b)" and "11(c)". Dr Fairgray, in the course of discussion, emphasised to the Denfords that he was treating the issues as those associated with "one incident and one incident only", namely the events materially concerning Mr Youngman. We find that Dr Fairgray then, and subsequently, so proceeded.

We find it unnecessary to further particularise the course of this meeting. The meeting, we comment, concluded on the specific basis that an early decision would be made and communicated to Mrs Denford.

We accept, in our reliance upon Mrs Denford's evidence in this context, that she instructed counsel (Mr Forbes), we infer, on 20 March. He (Mr Forbes) purposefully communicated by letter with the board and the nurses association. All material correspondence has been exhibited and closely considered by us. The correspondence, of course, in its terms is self-explanatory.

Dr Fairgray, we accept, closely considered how Mrs Denford should be dealt with. He concluded that she should be dismissed, this comprising, in all the material circumstances as they impressed him, the option which the board should exercise. He discussed the position, we accept, with the chief nurse for the board, who recommended dismissal of Mrs Denford. The decision to dismiss, however, was appropriately made by Dr Fairgray in the exercise of statutory authority delegated to him by the board.

He (Dr Fairgray), we accept, appropriately discussed procedural aspects of the meeting of 20 March with Mr Monk, the board's industrial relations manager, before

the meeting occurred and subsequently, in a procedural fairness setting, further consulted Mr Monk when he (Dr Fairgray) had decided to dismiss Mrs Denford. There was and is nothing, in our view, concerning Dr Fairgray's consultation/s with Mr Monk which was or were other than entirely appropriate in the material circumstances.

There was, we accept, a quite intensive exchange of correspondence upon the initiative of Mr Forbes, between counsel and Dr Fairgray, between 21 March to — more particularly—31 March 1989 (inclusive). Most unfortunately, we observe, the dismissal letter which Dr Fairgray issued to Mrs Denford, which is dated 21 March 1989, was misaddressed to her prior home address at 35 Grenville Street, Christchurch, rather than her then current address at 9 Westby Street, Christchurch. Mr Monk explained how this mistake occurred. In the result, Mrs Denford did not receive her dismissal letter, we accept, until 30 March 1989. The dismissal letter — exhibit "I" refers — provides:

21 March 1989

Mrs I M Denford  
55 Grenville Street  
Christchurch

Dear Mrs Denford

**Notice of Summary Dismissal From Employment with the Canterbury Hospital Board**

I refer to the discussions held in the Board's Central Administration office on Monday 20 March 1989 with you, your husband the Chief Nurse and myself to investigate allegations of misconduct in your capacity as a part time staff nurse at Christchurch Hospital. In essence, it has been alledged (sic) by a fellow staff nurse that:

1. On the night of 29.1.89 you deliberately and knowingly gave an unprescribed drug (I.M. Phenergan) to a patient in Ward 12A.
2. On the same night, you failed to notify medical staff that this drug had been given when it caused a deterioration in the patient's condition.

During the course of our discussions, you admitted to Mrs Wilson and myself that both allegations were true. Your explanation citing reasons of stress, tiredness and financial pressure for this behaviour, whilst acknowledged, is completely unacceptable to the Canterbury Hospital Board.

Having given this matter full consideration and in view of the extreme seriousness of your behaviour, I have decided to summarily dismiss you from employment with the Canterbury Hospital Board forthwith. This dismissal is based on your gross misconduct as detailed above.

Enclosed with this letter is a cheque which represents all monies owing to you (including accrued annual leave) as a final pay.

Yours faithfully

(Signed)

R A Fairgray

**Acting Associate General Manager — Patient Care**

There are certain aspects of this letter which are factually incorrect. Mrs Denford, we find — as the board, both through its counsel and Dr Fairgray, have candidly acknowledged — did not admit that her uncharted administration of phenergan to Mr Youngman "caused a deterioration in the patient's condition". Causation of this character was not, we now re-emphasise, admitted by Mrs Denford. Indeed, she was emphatic in her admission to the chief nurse and Dr Fairgray on 20 March that she had injected Mr Youngman with 5 mg only of phenergan to "settle him", in the

circumstances and for the reasons she explained. She did not admit that this administration caused a deterioration in Mr Youngman's condition which Dr Robertson was called upon by her to investigate. She admitted she did not in fact inform Dr Robertson that she had administered uncharted phenergan to Mr Youngman, but did not admit that this non-disclosure proceeded upon her acceptance that the quantity of the drug she had administered caused any deterioration in the patient's condition. Indeed, it was and is the case for Mrs Denford that it did not.

Dr Fairgray deposed that his understanding, which he formed from Mrs Denford's admissions to Mrs Wilson and himself, was that the uncharted/unprescribed phenergan which she (Mrs Denford) administered, was impliedly perceived by her as causing Mr Youngman's deterioration which Dr Robertson investigated. Upon the evidence we have heard no such implied admission was, we conclude, intended by Mrs Denford and/or in fact made by her.

Dr Fairgray — wholly acceptably to us — deposed that, notwithstanding his acceptance that this admission was not in fact — expressly or impliedly — made by Mrs Denford, his decision to dismiss her would certainly still have been made, and was made, irrespective of whether or not Mr Youngman's deteriorated state on 29 January was causatively linked or unrelated to the uncharted phenergan injection. In short, he deposed quite emphatically that he dismissed Mrs Denford because, in the materially admitted circumstances, she administered an uncharted drug to Mr Youngman in the circumstances she disclosed and failed to inform Dr Robertson of its administration when he was, shortly afterwards, investigating the patient's then condition. We simply paraphrase Dr Fairgray's evidence in this immediate setting, which we now re-emphasise impressed us as wholly reliable.

Mr Brandts-Giesen, reflecting the board's approach to Mrs Denford's contention/s throughout that she administered 5 mg only of phenergan to Mr Youngman, said "he could not concede on behalf of the board" that this quantity only of the drug was administered. Counsel emphasised that the only person who knew the amount of the drug actually administered was Mrs Denford.

Upon the evidence before us, despite our reservations in this setting, we find that probably only 5 mg of phenergan — as Mrs Denford deposed — was in fact administered to Mr Youngman. We are unable to conclude, upon the evidence before us, that this quantity of phenergan caused, or contributed to, Mr Youngman's collapse which Dr Robertson investigated. No informed medical evidence taking carefully into account the then known physical state of Mr Youngman and the impact, as a matter of informed opinion, of 5 mg of this unprescribed drug upon him — he being broadly described as then "seriously ill" — was adduced from any witness called at the hearing. Dr Bartle, we now re-emphasise — who was called by Mrs Denford as her witness — confirmed that he was in an insufficiently informed position concerning Mr Youngman's condition, at the material time of the uncharted drug injection, to express any definite opinion upon the impact upon Mr Youngman of 5 mg of phenergan. Dr Bartle simply did not know the medical condition of Mr Youngman, nor did he have any informed insights concerning his probable metabolism in a physical condition setting at the time the drug was administered.

Mr Forbes closely questioned Dr Fairgray upon the issue of the sequence of Dr Fairgray's decision to dismiss Mrs Denford, relative to certain observations made by Dr Fairgray in his letter of 22 March 1989 to counsel's firm. Counsel's concern is dealt with in the paragraph numbered 1. of exhibit "J" and reliably, we accept, responded to by Dr Fairgray in his letter to counsel dated 5 April 1989 (exhibit "N" refers). This letter provides:

5 April 1989

Mr A J Forbes

Barrister and Solicitor

Duncan Cotteril and Co (sic)

P O Box 5  
**CHRISTCHURCH**

Dear Sir

**STAFF NURSE IRENE MARGARET DENFORD**

I acknowledge your facsimile of 30 March 1989.

When the Chief Nurse and I saw Mrs Denford, with her husband, on Monday 20 March 1989, we promised that a speedy decision regarding her future with the Board would be made. Indeed, we indicated that it would be our endeavour to have a response reach her before Easter.

Your initial, rather lengthy facsimile was attended to as soon as it arrived. Needless to say, consultation with the Industrial Relations Officer was held. The logistics in preparing the reply inevitably took some time.

As a result of the work involved there was an apparent discrepancy in the timing of the information reaching you. However, I can assure you that the questions you asked were considered before the final decision concerning Mrs Denford's future had been finally determined.

It seems essential to reiterate that your client:

- Freely admitted to administering a drug without instruction or without justification;
- Offered no reason for her action, except to state that she was physically and emotionally exhausted;
- Admitted that she did not advise anybody of her action; and
- In particular, failed to advise the doctor who was investigating the cause of her patient's collapse about the injection she had administered.

In my view these actions are not compatible with accepted professional standards of a registered nurse, and are of such a departure from approved practice as to warrant dismissal.

I understand that the appropriate employee organisation, namely the NZ Nurses' Association, has declined to support Mrs Denford. Any right of appeal that Mrs Denford has against my decision to dismiss her from employment with the Canterbury Hospital Board will be contained within the Labour Relations Act 1987.

Finally, I should advise you that, as your client was informed, the Chief Nurse has a statutory obligation to notify the Nursing Council of this incident.

Yours faithfully

(Signed)

R A Fairgray

**ACTING ASSOCIATE GENERAL MANAGER — PATIENT CARE**

For the sake of completeness, in our summary in a correspondence setting, we confirm that a very material letter, which we accept Dr Fairgray sent to Mr Forbes, was not received by counsel's firm. We are satisfied, however, that this particular letter — exhibit "1" refers — was sent by the board on 29 March 1989. This particular letter is important because it — reliably we find — in common with Dr Fairgray's letter to counsel of 5 April 1989, particularises why the board, through him, dismissed Mrs Denford. The letter is important and we now cite it in full, namely:

29 March 1989

Mr A J Forbes

Barrister and Solicitor

Duncan Cotteril and Co (sic)

PO Box 5  
**CHRISTCHURCH**

Dear Sir

**STAFF NURSE IRENE MARGARET DENFORD — ALLEGATIONS OF  
SERIOUS MISCONDUCT**

I refer to our recent correspondence regarding Staff Nurse Irene Denford and, in particular, your faxed letter dated 23 March 1989. (Incidentally this letter was not received in my office until 28 March 1989.)

In that letter, you requested further clarification on certain points surrounding the allegations of misconduct against Mrs Denford and the way this matter was being dealt with by the Canterbury Hospital Board. Using the numbering of paragraphs from my previous letter, I would make the following comments:

2. I cannot accept your contention that "she was not aware that she had the opportunity of being represented by her union or association or her solicitor or any other person of her choice, if she desired". Mrs Denford, as indicated in my previous letter, was accompanied by her husband at the meeting with the Chief Nurse and myself. The responsibility for arranging representation at these meetings lies clearly with the individual concerned. Therefore, should Mrs Denford have required additional representation, she should have taken steps to arrange this herself. Had she done so, there would have been absolutely no objections from myself or the Chief Nurse.

3. The quantum of Phenergan administered by Mrs Denford is, quite frankly, irrelevant. The whole thrust of the allegation against Mrs Denford is that she knowingly and deliberately administered an unprescribed drug to a hospital patient. Such behaviour strikes directly at both the nurse/patient and nurse/hospital board relationships. The key point is that, for reasons known to herself and totally without authority, Mrs Denford administered an unprescribed drug to Mr Youngman.

The question of whether the drug itself caused a deterioration in the patient's condition is a purely secondary consideration. Of more relevance, is Mrs Denford's subsequent behaviour when the patient's condition did deteriorate in not advising medical staff of the drug she had administered to him.

5. As I have previously stated, Mrs Denford's actions strike directly at the nature of the nurse/patient and nurse/hospital board relationships. Her actions in administering an unprescribed drug to a patient in a "passive" state must, in anyone's view, constitute serious misconduct.

6. I repeat my previous comments that in all cases where serious misconduct is alleged on behalf of a Canterbury Hospital Board employee, the matter is given full consideration and a decision made as regards what action should be taken based solely on the circumstances in the particular case.

8. Again, as previously stated, my decision on the question of Mrs Denford's employment with the Canterbury Hospital Board will take into account all the circumstances in this particular case. Naturally, the points referred to in your previous letter fall into this category.

9/10. I have nothing to add to my previous comments made as regards both of these points.

Mrs Denford should, by now, have received formal notification of my decision regarding the question of her continued employment with the Canterbury Hospital Board. The letter I have sent to her is, naturally, of an extremely personal and confidential nature. Accordingly, should you require details of the contents and my decision, I would suggest you obtain these directly from Mrs Denford herself.

As a final comment, I would reiterate my previous statements that Mrs Denford has been given fair opportunity to be heard in this particular case. The Chief Nurse and myself took great care that Mrs Denford was given the opportunity of explaining her actions in our meeting held on 21 March (sic). Mrs Denford has freely admitted that she did administer an unprescribed drug to a hospital patient. Accordingly, I fail to see what could be gained from giving Mrs Denford "another opportunity to be heard" as regards the allegations against her. In view of Mrs Denford's own admission and the supporting information in this particular case, I have all the information needed to make a decision on the question of her continued employment with the Board.

Yours faithfully

R A Fairgray

**ACTING ASSOCIATE GENERAL MANAGER — PATIENT CARE**

We now return to Mrs Denford's approaches to, and communication with, the nurses association. She did not, we conclude, communicate with Ms Payne-Harker on 20 March following the meeting which she (Mrs Denford) and her husband had attended with the chief nurse for the board and Dr Fairgray.

We have earlier — albeit briefly — dealt with the irreconcilable conflict of evidence which exists between the evidence of Mrs Denford, on the one hand, and Ms Payne-Harker on the other. We now emphasise that we prefer the evidence of Ms Payne-Harker, namely that Mrs Denford telephoned her on 17 March, when the conversation we have earlier summarised, in fact, occurred. Mrs Denford, supported by Mrs Cole, contends that the discussion which Ms Payne-Harker said occurred on 17 March in fact, with modest variation, occurred on Monday, 20 March. We find that Mrs Denford did not, in fact, telephone Ms Payne-Harker on this latter date at all, despite Mrs Cole's supporting evidence to the contrary. We reject as untruthful Mrs Cole's account, namely that she surreptitiously listened in, by arrangement with Mrs Denford, to Mrs Denford's conversation with Ms Payne-Harker, through an extension telephone then available to Mrs Cole at the Denford home.

There are, we observe, certain inarguable and influencing factors which we consider must be brought to account in this case where evidentiary conflict exists. These factors, in our view — having seen and heard the witnesses — have significantly influenced the evidentiary approach and the evidence of Mrs Denford, her husband and Mrs Cole. Firstly, for compelling personal and financial reasons, as the Denfords — understandably, we comment — perceive them, Mrs Denford seeks reinstatement in her former employment. Mrs Denford's employment, in net terms, is worth, upon a recurrent basis in her role as a part-time staff nurse employed by the board, \$21,112.00 annually. Furthermore, we comment, it is professional employment in which Mrs Denford has very sustained experience, and which she wishes to immediately return to. The evidence very clearly establishes that this income is very important to the economy of the Denford family. Secondly, there are proceedings pending before the New Zealand Nursing Council which may significantly affect Mrs Denford's continued registration as a nurse. Although those proceedings, focusing as they do upon Mrs Denford in a registration/professional setting, are unrelated to the present proceedings, plainly favourable findings to Mrs Denford by this Court, namely that she was unjustifiably dismissed by the board for particularised



reasons of substantive and/or procedural unfairness, and an order, if made by this Court for her reinstatement to her employment by the board — even upon imposed conditions — could, and seemingly would, we consider, be persuasively used by Mrs Denford in the pending proceedings before the nursing council. In those proceedings, of course, possible deregistration of Mrs Denford, as a nurse, is in issue. For these reasons, which we merely summarise, there are plainly powerful incentives for the Denfords — and particularly, Mrs Denford — to seek to succeed in the present proceedings, independently, we stress, of the objective merits of her application/s in a grievance setting.

We broadly conclude that Mrs Denford, as a witness, has significantly over-stated her contended aggrieved situation in quite numerous material respects. We instance — but not exhaustively:

- (i) her contention, which we do not accept, that Enrolled Nurse Armstrong fully participated in the administration of the uncharted phenergan to Mr Youngman, and although acknowledged as being subordinate in status to a registered staff nurse, must, through her contended participation in what occurred, assume a professional responsibility/culpability. Effectively, we are invited by Mrs Denford to bring Nurse Armstrong's contended participatory role in what happened — but which we, in fact, reject as unfounded — into account, as a factor which was relevant to how Mrs Denford should be treated by the board, given that no action was taken against Nurse Armstrong, but which the board, in Mrs Denford's contention, failed to sufficiently investigate;
- (ii) her contention that Dr Robertson did not ask — we being satisfied that he did — whether medication had been administered to Mr Youngman. Mrs Denford, we now re-emphasise, admitted that she did not volunteer information to this doctor, but denied that he specifically asked whether medication had been administered before the patient's collapse;
- (iii) the contention, which she attributed to Principal Nurse Barnes during the interview on 16 March, namely the contention that Nurse Barnes said to Mrs Denford "we" — speaking of nurses generally — "have all done this at some time", that is to say administered unprescribed medication to a particular patient who, in the opinion of the administering nurse, needed such medication;
- (iv) her contention that Nurse Barnes effectively assured her that redeployment would be the option resorted to by the board — the emphasis is ours — as the disciplinary sanction by the board for what had occurred, rather that redeployment was an option which Nurse Barnes personally perceived as being appropriate under controlling conditions for a finite term affecting Mrs Denford's future employment by the board; and
- (v) her contention/s that she was unfairly misled by the events, commencing with the interview by Miss Barnes on 16 March, into believing that the 20 March meeting would concern, upon the board's initiative, the redeployment option only, rather than recourse by the board to the exercisable option of dismissal. We have already explained why we consider Mrs Denford in fact knew — the emphasis is ours — rather than simply being wilfully blind to the situation, that dismissal was an option which the board might exercise at, or following, the 20 March interview, notwithstanding that redeployment was also a possible option which the board might apply.

Mrs Denford impressed us as very prone, during her evidence, to subjectively, significantly distort material events/facts that occurred, to her perceived advantage, in the present proceedings. Furthermore, in our considered view, her evidence, upon certain material issues, was and is, we regret to say, untruthful.

In the common account, we now observe, by Mrs Denford and Mrs Cole, the association was characterised as essentially, throughout, unwilling to assist Mrs Denford; unsympathetic, and at times hostile, towards her — particularly Ms Payne-Harker — and unfairly prejudgmental of Mrs Denford's contended grievance, to the point that the association, through its Canterbury organisers, inappropriately failed to act upon/progress the grievance. Many of the criticisms of Mrs Denford concerning the nurses association, through its Canterbury officers, were very closely supported — and in our view, contrary to the objective truth — by Mrs Cole. She (Mrs Cole), we consider, was and is prepared to support her close friend, Mrs Denford, at all costs in the present proceedings when she can do so, to the perceived advantage of the grievant. Personal loyalty, we comment, is commendable, but not when it is reflected in a known distortion of the material truth, and in plain untruths. Unfortunately, we conclude, in our assessment of Mrs Cole's evidence, in material respects, she is not a witness upon whose evidence we feel able to rely.

Mrs Cole, as an experienced nurse, is very closely aware, we conclude, of the importance of the present proceedings to Mrs Denford and the potential further advantage to the grievant in the pending possible deregistration proceedings before the nurses council of favourable findings to Mrs Denford being made by this Court. She (Mrs Cole) acknowledged that her close friendship with Mrs Denford extends over "many years"; that for the past five years their children have attended the same school, namely St Marks Primary School in Christchurch; that they are in the same class, and that "when I had a serious illness a few years ago she" (Mrs Denford) "was very supportive in all aspects of that illness". Mrs Cole, we note, was supportively present to Mrs Denford throughout the present proceedings, notwithstanding their extended character.

Mrs Cole was also supportively, to Mrs Denford, present throughout and participated in the interview/discussion which Mrs Denford had with Mr Warr and Ms Payne-Harker, the association's officers in Canterbury, on 11 April 1989. Again, we comment, it was Mrs Cole — supported by the evidence of Mrs Denford — who contends that she (Mrs Cole) posted Mrs Denford's application to rejoin the nurses association, the posting of this application allegedly occurring on Friday, 31 March 1989, at the St Martins Post Office, notwithstanding that the application itself — exhibit "9" — is date-stamped by the association in Wellington on 11 April 1989. The date of the application — the emphasis is ours — is, of course, very materially relevant to certain of the threshold issues and Mrs Cole was quite emphatic that she posted it for Mrs Denford on 31 March, notwithstanding that it seemingly, we comment, then took the eleven ensuing days, in the course of post, to reach the head office of the association in Wellington. We recognise — in the absence of specific evidence as to when the application was physically received — that it might not, in fact, have been date-stamped immediately upon receipt. We are prepared, in these circumstances, to accept — to a standard of probability — that it was posted by Mrs Cole upon the date she deposed to, but not, we comment, without quite significant reservations concerning the truth of Mrs Cole's evidence in this context. She (Mrs Cole) was, of course, aware, we now re-emphasise, that the interview on 11 April at the association's office in Christchurch, was being secretly recorded by Mrs Denford, through a tape recorder, notwithstanding that the association's organisers were not. We again re-emphasise the factors immediately traversed, as indicative of just how supportive and how closely identified Mrs Cole was with the contended grievance of her close friend, Mrs Denford.

If, as we have found, there was no telephone call made by Mrs Denford to Ms Payne-Harker on 20 March — the relevant call having, in fact, been made on 17 March before Mrs Denford's meeting with the chief nurse and Dr Fairgray — then, apart from Mrs Cole's evidence, it would have been Mrs Denford's word only against the word of Ms Payne-Harker, as to when the relevant telephone conversation took

place. Mrs Cole, wholly unacceptably to us, contends she heard every word of the conversation through an extension telephone, but unbeknown to Ms Payne-Harker. She (Mrs Cole) explained that she adopted this "listening in" role because Mrs Denford was then in a very upset state following the meeting of 20 March; that impliedly it was important that a detached listener should carefully hear what Ms Payne-Harker said, and because she (Mrs Cole) wished to evaluate the attitude of the association, as expressed through Ms Payne-Harker, towards Mrs Denford, given that Ms Payne-Harker previously — according to Mrs Denford — had been abruptly hostile, unhelpful — and unwilling to help — and unsympathetic towards Mrs Denford. Mrs Cole's evidence in this setting, as to when this telephone discussion occurred — and we have commented earlier upon the importance of this conversation — resulted, conveniently to Mrs Denford, in the grievant having a corroborating witness who could confirm that the discussion occurred on 20 March, quite contrary to Ms Payne-Harker's evidence.

Mrs Cole, we comment, had the opportunity, in a pre-trial setting, to contradict Ms Payne-Harker's contention that Mrs Denford, contrary to Ms Payne-Harker's request, had not telephoned her and advised her (Ms Payne-Harker) as to the outcome of the meeting attended by the chief nurse and Dr Fairgray on 20 March. The tape recording — exhibit "AA" — demonstrates that Ms Payne-Harker emphasised this contended failure on several occasions to Mrs Denford while Mrs Cole was present during the interview/discussion which occurred on 11 April 1989. Mrs Cole then, we re-emphasise, had the opportunity to immediately contradict Ms Payne-Harker, but did not exercise it. If it was true that she had heard the conversation, she (Mrs Cole) could very easily have said to Ms Payne-Harker that Mrs Denford did telephone you on 20 March, "because I was present on that Monday with her when the call was made". It was not necessary, we comment, for Mrs Cole to challenge Ms Payne-Harker upon the basis that she (Mrs Cole) heard every word of the contended conversation without the knowledge of Ms Payne-Harker, because she (Mrs Cole) was on an extension phone. No contradiction of Ms Payne-Harker's contention that Mrs Denford had not rung her on Monday, 20 March, following the meeting was made by Mrs Cole, we conclude, because she was then unprepared, on 11 April in the interview/discussion which was then taking place, to confront/contradict Ms Payne-Harker with what she (Mrs Cole) knew was an untruth. In short, there was, as Mrs Cole well knew, no telephone conversation which she overheard on Monday, 20 March 1989.

We find Mrs Cole's explanation, in evidence during the present hearing, for failing to contradict Ms Payne-Harker's contention/s made on 11 April that Mrs Denford had not telephoned her after the 20 March meeting, is quite unsatisfactory. She (Mrs Cole), under cross-examination by Mr Robson, purported to explain her failure to contradict Ms Payne-Harker by saying that, at the material time, she found herself "bamboozled, on the spot" by Ms Payne-Harker's insistence that Mrs Denford had not telephoned her concerning the meeting on 20 March, contrary to the arrangement that she (Mrs Denford) would do so. Plainly, we comment, Ms Payne-Harker then contended to Mrs Denford that she had not telephoned her, contrary to their arrangement, because this was the objective truth of the matter. Logically, Ms Payne-Harker then had no reason to contend that no telephone call had been made by Mrs Denford to her on 20 March if Mrs Denford did in fact so telephone her. Furthermore, of course, Ms Payne-Harker was then oblivious of the fact that what she was contending to Mrs Denford in this setting was then being clandestinely taped.

We now return to Mrs Denford's approaches — both personally and through her solicitors — to the association concerning her situation. We have already briefly dealt with the discussions which she (Mrs Denford) had with Ms Payne-Harker on 16 and 17 March 1989 preceding her critical meeting with the chief nurse for the board and Dr Fairgray on 20 March. Those discussions — which we find Mrs Denford initiated

in each instance — were exploratory, in our view, in nature. Mrs Denford knew she had resigned her membership from the nurses association during January of 1989.

Essentially, we find, in these two discussions with Ms Payne-Harker which occurred prior to 20 March, Mrs Denford was seeking advice as to whether the association could effectively — again the emphasis is ours — assist her in the serious difficulties confronting her if she (Mrs Denford) rejoined the association. She was also seeking, we consider, to get as much gratuitous advice as she could from Ms Payne-Harker through discussing her situation with the organiser. Ms Payne-Harker — realistically, in the material circumstances, we consider — emphasised strongly, and repeatedly to Mrs Denford, just how serious her position was, even if she (Mrs Denford) had then been a member of the association. In short, Ms Payne-Harker appropriately, we consider, stressed to Mrs Denford that her situation was so inherently serious as to render it very difficult for the association — even if Mrs Denford had then been a member — to effectively assist her. We find that Mrs Denford, understandably, did not like the advice Ms Payne-Harker gave her but this realistic approach which Ms Payne-Harker adopted, in our view, was obviously called for in the material circumstances.

The admitted events that had led to Mrs Denford's then suspension and possible future dismissal by the board, were very serious: it would have been quite inappropriate and unhelpful, in our view, for Ms Payne-Harker to have — in colloquial terms — “promised Mrs Denford the moon” if she rejoined the association because of the grave reservations which Ms Payne-Harker reasonably had as to whether the association could, in fact, really assist Mrs Denford. We are satisfied that Ms Payne-Harker made it plain to Mrs Denford — for reasons which she (Ms Payne-Harker) explained — that a prerequisite to the association becoming officially involved upon account of Mrs Denford in, effectively, the difficulties then confronting Mrs Denford, was that she (Mrs Denford) should rejoin the association.

Mrs Denford strongly contended that Ms Payne-Harker was very unsympathetic and, indeed, hostile towards her. We accept that this perception by Mrs Denford was founded upon her misappreciation and subjective misunderstanding of what Ms Payne-Harker was saying to her because Mrs Denford did not truly wish to “listen” and accept the reasons advanced by Ms Payne-Harker for her approach to the issues. Firstly, Mrs Denford said that Ms Payne-Harker's emphasis upon the seriousness of the situation was, in effect, unsympathetic. In fact, Ms Payne-Harker, we now re-emphasise, realistically, in our view, focused upon the issues. She concluded that realism, not false sympathy, was appropriate. Ms Payne-Harker was, we consider, correct in this approach to Mrs Denford. Secondly, Mrs Denford considered that Ms Payne-Harker was especially unsympathetic towards her and distanced herself and the association from Mrs Denford because she (Mrs Denford) was not then a member of the association. Ms Payne-Harker, we find, in fact made it plain to Mrs Denford what the association's approach to non-members seeking advice from the association was, and why, legally — in effect — this approach was followed. Again, as it seems to us — unwelcome as Ms Payne-Harker's approach in this immediate setting was to Mrs Denford — her approach was, in substance, legally and factually appropriate.

There was, however, as it seems to us, no request made by Mrs Denford of Ms Payne-Harker on 16 and 17 March that the association should formally act for Mrs Denford in a then developing, contended grievance setting. Although suspended on 16 March, Mrs Denford was hopeful, we accept, that she would be redeployed by the board and only dismissed — as Miss Barnes had intimated to her on 16 March — if she (Mrs Denford) did not accept such redeployment as the board might prescribe. Following the meeting on 20 March, Mrs Denford then knew, in fact, that the board would probably dismiss her for what had occurred, in an uncharted drug setting, relating to Mr Youngman. Any considered grievance founded in dismissal was, of course, then prospective only, because no decision had been made by the board that

Mrs Denford would be dismissed. The issues were simply under close consideration by the board, through Dr Fairgray. No contended grievance founded upon a dismissal then existed because the possible/probable dismissal was prospective only at this point.

We conclude that although Mrs Denford had earlier sought advice and support from the association, she did not formally request it to then act for her in relation to any contended personal grievance.

Mr Forbes, we emphasise, was instructed to act for Mrs Denford on either 20 or 21 March. He proceeded promptly and, we consider, with meticulous care, to act protectively thereafter concerning Mrs Denford's situation. Independently of the particularised approach in contended procedural fairness and substantive lack of justification settings, which Mr Forbes explicitly traversed in his ensuing intensive correspondence with the board, he (Mr Forbes) formally sought the association's assistance. We now focus — but in summary — upon the approach which Mr Forbes followed in dealing with the association upon Mrs Denford's behalf.

An examination and analysis of the correspondence demonstrates, we conclude, that Mrs Denford — through Mr Forbes — qualified, effectively, her request/s from 21 March that the association should act for Mrs Denford in her developing contended grievance situation with the board, if she rejoined the association (the emphasis is ours). We instance in this setting, paragraph 3 of counsel's letter to the association dated 21 March — exhibit "F" refers — namely:

3. Could you please advise whether your Association is prepared to support, advise or assist Mrs Denford in regard to this matter, if necessary on condition that she re-joins the Association. We would suggest that, having regard to her relatively recent resignation and the fact that she was for many years a member of the Association, it would be appropriate for the Association to do this. If so, could you please advise what role the Association would normally play in a matter such as this where one of its members is the subject of such an allegation and possible disciplinary action, which it appears may include dismissal.

Similarly, Mr Forbes — having received no formal reply from the association to exhibit "F" — purposefully wrote again to the nurses association — exhibit "K" refers — as follows:

30 March, 1989

The Secretary  
New Zealand Nurses Assn (Inc.)  
WELLINGTON

**fAX (sic) (04) 829.993**

Dear Sir/Madam

Re: Staff Nurse Irene Margaret Denford/Canterbury Hospital Board

1. We refer to our fax of 21 March 1989, to which we note we have received no reply.
2. Enclosed is a copy of a letter dated 21 March 1989 now received by our client. You will see that she has been summarily dismissed. This decision is not accepted by her and she intends to challenge it. We have had correspondence with the Canterbury Hospital Board as to the grounds for investigation and dismissal. The replies from the Board, in our view, are unsatisfactory and contain errors.
3. Our client will want to pursue a personal grievance under the Labour Relations Act 1977 (sic), seeking reinstatement, reimbursement and compensation on the grounds of unjustifiable dismissal. As requested in our letter to you of 21 March, she again seeks the support of your Association.

4. Can you please advise whether there is any disputes procedure in the award applicable to our client and, if so, could we please have a copy. Would you please advise if there is any other statute, by-law or regulation which is applicable to our client's dismissal and as to any remedy or right of appeal which she has, in particular following the repeal of the Health Services Personnel Act 1983.
5. Under the Labour Relations Act 1977 (sic) Mrs Denford is entitled to rejoin your Association and request that it pursues a personal grievance on her behalf. Would you please confirm that she can do this and would you please advise whether your Association is prepared to pursue a personal grievance on her behalf (i.e. assuming that there is no other prescribed procedure or remedy available to enable her to pursue her challenge to the decision to dismiss her). We can supply you with copies of the correspondence which we have had with the Canterbury Hospital Board, which effectively sets out the basis of what would be our client's challenge to the decision made dismissing her. It may also be necessary to get appropriate medical and nursing evidence in regard to the allegations made against our client and the proper relative significance of what she is alleged to have done and what she admitted. It is alleged that she admitted that the 5 mg of phenergan which she gave to the patient in question caused a deterioration in his condition. Our firm instructions are that that was never admitted by our client and nor was it ever suggested to her that this was the case. Preliminary medical information obtained both by our client and ourselves suggests that it is highly unlikely that the administration of that quantity of this drug would have caused a deterioration in the patient's condition, in particular that it would have caused a transient ischaemic attack, which was what the patient appeared to have suffered at the time or shortly after the drug was administered.
6. We have asked the Canterbury Hospital Board (but to date have had no reply) whether there are previous cases where a nurse with our client's good employment record has been dismissed for the unauthorised administration on one occasion of a similar quantity of a similar drug. We have also asked the Canterbury Hospital Board to elucidate as to why, as is claimed, it should be "patently obvious" why our client's behaviour was considered so serious as to possibly justify her dismissal. Again, inquiries made on behalf of Mrs Denford and by ourselves to date have resulted in "considerable surprise" that what she did on this occasion should have been considered sufficiently serious as to justify her dismissal. Our client accepts that what she did was wrong but the consequences must be relative to the seriousness of her action.
7. If our client rejoins your Association but it refuses to act or act promptly in regard to her case, then she will be entitled to and will pursue a personal grievance in the Labour Court herself. However, we would like to have an opportunity of discussing that with you (or your Canterbury representative). We would obviously want to know the reasons why your Association was not prepared to act on the matter.
8. Would you please let us have a reply as soon as possible.

Yours faithfully

DUNCAN COTTERILL

c.c. Ms C. Payne-Harker

NZ Nurses Assn (Canterbury branch) Inc.

CHRISTCHURCH

Fax 667.027

Again, we emphasise that paragraphs 5. and 7. of this letter reflect Mrs Denford's expectation/s of the association if she (Mrs Denford) rejoined it. Essentially, we conclude, Mr Forbes was seeking in this letter confirmation that the association would respond to his request that it should act for Mrs Denford in her contended personal grievance setting if she, as a recognised prior foundation to that request, rejoined the association.

The association's faxed response through its head office (Mr Robson) — exhibit "L" refers — was as follows:

DATE: 31 March 1989

MESSAGE TO: Duncan and Cotterill (sic)

ADDRESSEE'S FACSIMILE NUMBER: 03 797 097

FOR: A.J. Forbes

FROM: O.J. Robson  
NZNA Industrial Officer

MESSAGE:

RE: Mrs I.M. Denford

Your fax message dated 30 March is acknowledged. Your previous fax was not received by this office but our Canterbury office has seen it.

The matter is being dealt with from our Canterbury office. I have reviewed the situation and have referred the case to our Economic Welfare Committee. I have absolute confidence in Ms Payne-Harker's judgement to date.

Personal Grievance procedures (sic) are not available to people who are not members "...at the time when the union is requested..." (refer section 216(1) L.R. Act 1987). When Mrs D. approached our Canterbury office, she was advised to rejoin. She did not do so. Your action (per letters 21 and 30 March) in formally advising us that Mrs D requests assistance, before she rejoined, is a critical factor in developing a situation where she has lost her industrial rights. This should be a consideration in your minds before you attempt to charge Mrs D. for any services you have rendered.

Your attention is drawn to section 218(a) (sic) L.R. Act 1987. Our obligations in this regard, even with members, is to "deal" with the grievance "promptly". This has been judicially defined and imposes an obligation to assess the case properly and tender advice which in some cases will be that the case is not worth pursuing for a variety of reasons.

Mrs Denford undertook to contact our Canterbury office after her 20 March meeting with management. She has not done so.

We are still prepared to discuss the situation with Mrs Denford. We are not prepared to to (sic) deal via the intermediary agency of a law firm.

(The emphasis is ours.)

We have emphasised part of the association's faxed response simply to re-confirm the consistency of Ms Payne-Harker's evidence that, contrary to what Mrs Denford and Mrs Cole contended during the hearing, she (Mrs Denford) did not in fact communicate with Ms Payne-Harker concerning the outcome of the meeting of 20 March. The association's position, we comment, is formally placed on record by Mr Robson in this immediate setting through advice he had received from Ms Payne-Harker that Mrs Denford did not re-approach the association following her meeting with Chief Nurse Wilson and Dr Fairgray on 20 March.

We do not, with respect however, agree — as Mr Robson contends in exhibit "L" — that Mr Forbes, either in fact or in law, had formally requested the association to act for Mrs Denford in a grievance setting before she rejoined the association as a member. We have, we now re-emphasise, earlier found that Mrs Cole probably posted Mrs Denford's application to join the association on 31 March. By arrangement, Mrs Denford saw Mr Warr and Ms Payne-Harker on 11 April.

This meeting proceeded, we find, upon the accepted basis that Mrs Denford was then formally requiring the union to act for her upon her contended personal grievance, that is to say her alleged unjustified dismissal by the board. Mr Warr and Ms Payne-Harker plainly proceeded, on 11 April, to deal with Mrs Denford upon the basis that she was then a union member, entitled as such to comprehensive, supportive assistance from the association in her contended grievance setting. There was no suggestion then, we observe, that Mrs Denford could not exercise her industrial rights in a grievance setting, through the association, because she was allegedly only a category "B" member, but not a qualifying category "A" member under the association's membership rules.

There is, in our view — with respect to Miss Bucket's submissions to the contrary, which we provisionally dealt with in our ruling on 31 July herein — no disqualifying substance in the submissions which now affect Mrs Denford. We shall subsequently enlarge upon our conclusions in this immediate context.

We also conclude — for reasons we shall subsequently further enlarge upon — that:

- (i) Mrs Denford should, both in fact and in law, be regarded as rejoining the association from 31 March, when her application was posted on that date by Mrs Cole; and
- (ii) when she (Mrs Denford) arranged the meeting for 11 April 1989 with Ms Payne-Harker's secretary (Beverley), which we find was probably on 31 March or immediately subsequent thereto, this arrangement followed the completion of her union membership form and the probable posting of that application to the association. Certainly, from the completion and posting of this application, Mrs Denford was then qualified to formally require — and did so request — the association to act for her in a grievance setting. The plain purpose of the meeting on 11 April 1989 was to investigate and evaluate Mrs Denford's contended grievance with the board.

The meeting on 11 April impresses us as being undertaken with commendable, comprehensive thoroughness by Ms Payne-Harker and Mr Warr. We firmly conclude that both officials approached and participated in this meeting purposefully and conscientiously. Indeed, that part of the tape recording available to us — independently of the evidence of Ms Payne-Harker and Mr Warr, which we accept as reliable — confirms our immediately expressed conclusions.

Mrs Denford and Mrs Cole — effectively — both deposed that Ms Payne-Harker and Mr Warr approached this meeting with a predetermined view as to its outcome, which would be adverse to the grievant. Both essentially contended that the officials were simply "going through the motions", in colloquial parlance. We reject these contentions of Mrs Denford and Mrs Cole. We also reject Mrs Cole's contention that Mrs Denford did not get a fair hearing from the officials, and that Mr Warr "sat there looking out the window", Mrs Cole's suggestion being that he (Mr Warr) was quite disinterested in the meeting and made no secret of his disinterest to Mrs Denford and Mrs Cole.

We firmly conclude that both Ms Payne-Harker and Mr Warr were supportive in their approach to Mrs Denford; appropriately sympathetic to the grievant's situation; and commendably searching in their approach to, and examination of, the material issues. This meeting was, we now emphasise, held over a period of one and a half to one and three-quarter hours. Neither official committed the association to further progressing the contended grievance to, say, a grievance committee hearing stage. Mrs Denford was told that the association's decision as to whether it would proceed further with her contended grievance would be communicated to her in due course.

Promptly, we find, Ms Payne-Harker and Mr Warr attended, by arrangement, upon Mr Monk, the industrial relations manager for the board, the following day, 12 April.



Aspects of the grievance were then, we find, fully, appropriately discussed between the association's officials and Mr Monk. It is unnecessary, we conclude, to detail the course and/or nature of this discussion. We have closely considered the evidence in this setting of Mr Monk, Mr Warr and Ms Payne-Harker. It will suffice for us to say that, in our view, essentially all issues of possible relevance and/or advantage to Mrs Denford, which might cause the board to either modify its dismissal decision and/or which might cause the association to conclude that it should progress the grievance further, were explored.

Mr Warr and Ms Payne-Harker concluded, appropriately and, as it seems to us, upon reasonable grounds, that the association would not progress the contended grievance further because the association could not, in the joint view of its officials, effectively contend and/or establish that the board's dismissal of Mrs Denford was unjustifiable, either for substantive reasons or because of contended procedural unfairness associated with the dismissal and/or materially preceding but related events.

Having heard the evidence of Mr Warr and Ms Payne-Harker in this setting, we conclude that neither misappreciated and/nor misapplied any principle which was relevant to their decision that the association would not progress the contended grievance further.

Mrs Denford was notified by Mr Warr of the association's decision, which was adverse to her, by letter dated 20 April 1989 (exhibit "O" refers), namely:

20 April, 1989

Mrs R Denford  
9 Westby Street  
**CHRISTCHURCH 2**

Dear Mrs Denford

We have thoroughly investigated your grievance complaint regarding your dismissal from your position at Christchurch Hospital.

After considering all relevant material made available to us we have made a decision not to proceed further with your complaint.

It is always very difficult and with a certain degree of reluctance to arrive at such a decision, but we believe our decision is the proper one in this instance.

I regret we are unable to offer further assistance.

Yours faithfully  
(Signed)  
**TREVOR WARR**  
**NZNA ORGANISER**

Mr Forbes, on 26 April, wrote to the association — exhibit "P" refers — in these terms, namely:

26 April, 1989

Mr T Warr  
New Zealand Nurses' Association Inc  
P O Box 4102  
**CHRISTCHURCH**

Dear Sir

Re: Mrs I M Denford

Your letter of 20 April to Mrs Denford has been referred to us. As you know, we have been acting for her in regard to her dismissal from her position at Christchurch Hospital.

Although the Industrial Relations Act 1987 (sic) does not impose any express obligation on a union to give reasons for failing to act in respect of a personal grievance, we would suggest that Mrs Denford is entitled to know what the reasons are. In particular, she is concerned as to your reference to having considered "all relevant material made available to us". That suggests that you may have information which Mrs Denford is unaware of or information which is not in fact relevant to the actual grounds on which Mrs Denford was purportedly dismissed.

Would you please advise whether you are prepared to explain the Association's reasons to Mrs Denford and advise her as to the relevant material made available to you in reaching that decision.

Could you also please advise the correct name of the award or industrial agreement applicable to Mrs Denford prior to her dismissal.

Yours faithfully

DUNCAN COTTERILL

Mr Warr, on 4 May, responded to Mr Forbes letter — exhibit "Q" refers — thus:

4 May, 1989

Duncan Cotterill  
Barristers & Solicitors  
P O Box 5

CHRISTCHURCH

Attn: A.J. Forbes

Dear Sirs

RE: MRS J.M. DENFORD

Your letter of 26 April, 1989 refers.

You would be correct in stating the Labour Relations Act (Not the Industrial Relations Act as referred to by you) does not impose an obligation on a union to give reasons for its decision not to act.

The court's comments in response to S218 application are relevant in determining a union's obligations. You will no doubt, of course, be familiar with these.

I am not prepared to provide an explanation for our decision nor to advise you or Mrs Denford of the material made available to us, (sic)

I believe that we were in possession of all information surrounding Mrs Denford's case and we have made our decision based on that information and our organisation's collective expertise in handling personal grievances.

I have no reason to believe that there are any other pertinent facts that we have been unaware of which would have led us to a different decision.

The N.Z. Hospital and Area Health Boards Nurses' Award is the correct name you seek.

Yours faithfully

(Signed)

TREVOR WARR  
N.Z.N.A. ORGANISER

We have earlier commented adversely upon material aspects of the evidence of Mrs Denford, Mrs Cole and — to a more limited extent — Mr Denford, which was given during this hearing. For completeness, we now comment upon the impression which other material witnesses made upon us. The board's witnesses unexceptionally impressed us as wholly truthful and reliable in their differing accounts. Dr Bartle, called by Mrs Denford, was plainly a truthful witness but, as he acknowledged, not currently, closely informed as to hospital practice, and not precisely aware of the medical situation when an uncharted phenergan injection of 5 mg was administered to this patient by Mrs Denford. Nurse Armstrong, Ms Payne-Harker and Mr Warr also impressed us most favourably in their material evidence.

We conclude our summary of the material background and facts by commenting that we have taken fully into account the evidence we have heard concerning disciplinary proceedings taken by the board against other nurses during the 1970s and 1980s. We suppressed certain of that evidence during the hearing and the disclosed names of the nurse/s concerned where we considered it justly appropriate, in their private interests, to do so. None of the named persons concerned had, of course, any opportunity to be heard during the proceedings in relation to the evidence which critically concerned them. Except in one instance concerning the unprescribed administration by a nurse of morphine to a patient — where the evidence did not closely establish the circumstances of that administration — none of the other cases traversed — and only one of the other cases, which occurred in 1984, concerned drugs — impressed us as factually similar to the events for which Mrs Denford was dismissed. If it had been shown in the present hearing that other cases, very similar in principle and upon the material facts to Mrs Denford's situation, had been dealt with quite differently by the board, then we would have taken such seemingly disparate treatment into account, using those other cases — had they existed — as a guide, in a setting where plainly a consistency of approach by the board could and should reasonably be expected. In our view, no such position of advantage to Mrs Denford was disclosed in the evidence which we have closely considered in this specific context.

There is, we accept in our reliance upon Mr Monk's evidence in this setting, no formal written code of practice to which the board is a party, which governs the format of disciplinary proceedings brought by it against a nurse employed by the board. The board is, of course, as an employer, obliged, for reasons which are necessarily inherent and imperative in any disciplinary procedure it adopts and follows, to act fairly in relation to any nurse who is the subject of disciplinary investigation, evaluation and decision by the board.

We now turn to the submissions of counsel and the advocate which we considered closely before this judgment was prepared.

#### The Submissions of Counsel and the Advocate:

Mr Forbes — supported by Miss Lennon in relation to certain of the threshold issues — spoke to a typed synopsis of counsel's argument. Mr Forbes enlarged upon this outline of argument. During her submissions Miss Lennon adopted the same course.

Miss Lennon referred us to the following authorities, namely those decisions to which we have earlier herein referred, that is to say Madden v. Peak, Rogers & Co [1981] ACJ 129, and N.Z. Workers' IUOW v. Proprietors of Tahora No. 2F2 — Papuni Station [1989] 1 NZILR 888 (CA). Additionally, Miss Lennon referred to and relied upon the judgment in McMullan v. Bowley & G.R. Stevens & Co [1981] ACJ 617 (C.A.).

Mr Forbes referred to and relied upon the following authorities, upon the leave issues upon which counsel addressed us, namely: Allfrey v. South Canterbury Hospital Board [1983] ACJ 131; Peden v. Tingeys Ltd [1985] ACJ 471; Jones v. Home Bay Cottage [1980] ACJ 61; Perera v. Manukau City Council [1987] NZILR 78; the

Bowley case (supra), and Air New Zealand Ltd v. Johnston [1989] 2 NZILR 49 (CA). We referred this case to the attention of all counsel and Mr Robson, given its recent issue by the Court of Appeal, and provided copies of the judgment to counsel and the advocate.

He (Mr Forbes), in the course of his particularised submissions, also referred to and relied upon the following authorities, namely: Fiordland Venison Ltd v. Minister of Agriculture [1978] 2 NZLR 341 (C.A.); Auckland City Council v. Hennessey [1982] ACJ 699 (C.A.); Brunel v. Chas S Luney Ltd & Ors [1988] NZILR 1456; North Island Wholesale Groceries Ltd v. Hewin [1982] 2 NZLR 176 (C.A.); Sinclair v. Neighbour [1967] 2 QB 276; Cyril Leonard & Co v. Simo Securities Trust Ltd [1971] 3 All ER 1313; Simi v. Surfseeker Sports Wear Ltd [1986] ACJ 836; Auckland Shop Employees IUOW v. Woolworths (N.Z.) Ltd [1985] 2 NZLR 372 (C.A.); Squire v. Waitaki N.Z. Refrigerating Ltd [1985] ACJ 370; Marlborough Harbour Board v. Goulden [1985] 2 NZLR 378 (C.A.); N.Z. Amalgamated Engineering etc IUOW v. Milburn N.Z. Ltd [1989] 1 NZILR 57; Daganayasi v. Minister of Immigration [1980] 2 NZLR 130 (C.A.); N.Z. (with Exceptions) Timber Industry Employees IUOW v. Carter Oji Kokusaku Pan Pacific Ltd [1987] NZILR 170; R v. Awatere [1982] 1 NZLR 644 (C.A.); Marshall v. Whangarei City Council [1987] NZILR 172; Leary v. National Union of Vehicle Builders [1971] 1 Ch 34; Lane v. Norman (1981) 66 LT 83, and Wislang v. Medical Practitioners Disciplinary Committee [1974] 1 NZLR 29.

In short, Mr Forbes submitted that:

- (i) leave should be granted to Mrs Denford to have her grievance determined by this Court upon her direct application to the Labour Court pursuant to section 218(1)(a) of the Labour Relations Act;
- (ii) Dr Fairgray's decision to dismiss was jurisdictionally vitiated because the chief nurse (Mrs Brenda Wilson), without delegated statutory authority, was effectively a decision-maker, participating in the decision to dismiss without statutory authority to so participate in this process and decision; and
- (iii) the dismissal, for reasons Mr Forbes closely particularised to us, was, in counsel's contention, substantively unjustified and carried out in a procedurally unfair manner.

Mr Forbes, in addressing us upon the remedies he invited the Court to order upon setting aside Mrs Denford's dismissal, emphasised the primacy of reinstatement as a remedy under the Labour Relations Act. Counsel acknowledged that, in the particular circumstances of the present case, it would be appropriate for the Court to impose constraints, through prescribed conditions attached to the ordered reinstatement of Mrs Denford, which would redress for a prescribed period the concerns, essentially in a patient care setting, which had so exercised the board's mind in its decision to dismiss Mrs Denford. Counsel submitted that Mrs Denford, through him, acknowledged that this Court could appropriately, through conditions imposed for a defined period, restrict Mrs Denford's access to drugs generally, in her reinstated nursing employment by the board.

Counsel further acknowledged that — as he expressed the position — “in view of the way the case has developed” — plainly referring to the indisputably very serious character of Mrs Denford's conduct as a registered nurse which led to her dismissal — that the Court could appropriately award no compensation to the grievant, which was formally sought in the sum of \$5,000.00. Counsel so acknowledged expressly, we note, as he advised the Court upon Mrs Denford's instructions to him, now reflecting her contended awareness of the gravity of what she had materially done in relation to Mr Youngman. Mr Forbes, in making this submission, contended that the evidence clearly, in his view, demonstrated in a grievance setting that, pursuant to

section 227(c)(i) of the Act, \$5,000.00 was certainly, as to quantum, a cogently arguable and, Mr Forbes submitted, appropriate award. He (Mr Forbes) further acknowledged, in a wage loss setting, that a consistency of approach in relation to this issue and the compensation issue would appropriately occasion, in the circumstances of the case, recourse by the Court to section 229(3) of the Act. This course, Mr Forbes accepted, would be appropriate because plainly, if the personal grievance was upheld by us, then Mrs Denford's conduct had significantly contributed to the grievance situation which the present hearing concerned.

Counsel sought costs against both the board and — after an expressed “change of heart” in this setting which arose during his reply — the nurses association. We simply comment that initially counsel disclaimed any application for costs against the association during his closing submissions but, having heard, and during his reply to, Mr Robson's submissions, confirmed that Mrs Denford now expressly sought costs against the nurses association.

Mr Robson addressed detailed submissions to us in a leave/threshold setting. He spoke to typed submissions.

The threshold issues, we comment, break down into three separate issues as argued by the association. Firstly, it is contended that Mrs Denford lacks jurisdictional status — *locus standi* — to bring grievance proceedings upon the material evidence pursuant to section 216(1) of the Act, considered in conjunction with section 218(1)(a), because she was not a member of the association when she requested the association to act for her in a grievance setting. This lack of status was — in Mr Robson's submission — fatal then and now, for reasons which the advocate closely developed.

Secondly, it is submitted that if the Court held that Mrs Denford seemingly otherwise satisfied the status/threshold qualifications imposed by section 216(1) of the Act, considered conjunctively with section 218(1)(a), then she could not, in any event, under the membership rule of the association, acquire exercisable industrial rights in a grievance setting because she was only, on rejoining the association, a category “B” member of the association. Mr Robson also developed this line of argument for particularised reasons.

Thirdly, Mr Robson submitted that if the Court found in favour of the grievant upon each of these immediately summarised threshold issues, then the Court, he contended, must hold that she (Mrs Denford) had not proved that the union had failed to act and/or failed to act promptly for her, within the setting of section 218(1)(a) of the Act. To the contrary, Mr Robson submitted, the association, in declining to progress Mrs Denford's grievance beyond the stage at which it made a decision to proceed no further, had faithfully, purposefully and wholly justifiably decided that it would not proceed further. Mr Robson closely developed his submissions in this context.

Mr Robson referred us to the following authorities, namely: the Papuni Station case (supra); Madden's case (supra); Cowley v. Ball [1980] ACJ 211; Scrimgeour v. Tamaki City Council [1987] NZILR 915 (1988) 2 NZELC 95,842; Perera's case (supra); Allfrey's case (supra), and Air New Zealand Ltd v. Johnston (supra).

Mr Robson expressly sought an order as to costs in favour of the association against Mrs Denford.

Mr Brandts-Giesen addressed oral submissions to the Court. Counsel emphasised, in a patient care and professional setting, the gravity of Mrs Denford's conduct which had caused Dr Fairgray to dismiss her. He (Mr Brandts-Giesen) closely developed why the board regarded what had occurred on 29 January 1989 in Mrs Denford's care and management of Mr Youngman as a patient, as fundamentally gravely incompatible with her function/role as a registered nurse, and absolutely contrary to the board's known and reasonable expectations of her, both professionally and as the board's

employee. Counsel submitted that the dismissal, for reasons Mr Brandts-Giesen particularised, was both substantively justified and carried out in a manner which was essentially just and fair.

Mr Brandts-Giesen adopted the threshold submissions which were fully addressed to the Court by Mr Robson. He (counsel) sought an order as to costs in favour of the board against Mrs Denford.

We confirm that we heard the submissions of counsel and the advocate throughout Friday, 11 August, until 6.50 pm. We have simply summarised their submissions herein, which we have closely considered in their entirety, before this judgment was prepared.

### The Conclusions of the Court:

We now adopt the conclusions previously expressed by us during our treatment herein of the material background and facts. We conveniently turn initially to the threshold issues.

#### (a) The Threshold Issues:

We now re-emphasise our previously expressed conclusions, namely that:

- (i) Mrs Denford, having resigned from the association in January of 1989, effectively rejoined the nurses association when she (Mrs Denford) completed her application for renewed membership and caused Mrs Cole to post the application on 31 March 1989 to the head office of the association in Wellington;
- (ii) the association, compatibly with the course taken by Mrs Denford, which we have immediately summarised, regarded her as having rejoined the association from the time that she completed and submitted, through the post, her formal application for membership. This occurred, we now re-emphasise, on 31 March 1989. The association did not then, the evidence very clearly establishes, perceive, or inform Mrs Denford, that she was a category "B" member only in the association, having no exercisable industrial rights and, more particularly, exercisable rights in a contended personal grievance setting through the association. Indeed, the association was then keenly aware that Mrs Denford's purpose in rejoining the nurses association was to immediately exercise contended grievance rights through the association against the Canterbury Hospital Board;
- (iii) the association, through its Canterbury officials, from 11 April 1989, closely investigated, evaluated and subsequently decided to take no further action concerning Mrs Denford's contended grievance against the board. This course of investigation, evaluation and decision by the association concerning the contended grievance, was plainly adopted, in recognition by it, that it was then legally obliged to progress Mrs Denford's grievance within defined parameters provided for by material provisions in the Labour Relations Act and the award governing Mrs Denford's employment, namely the New Zealand Hospital and Area Health Boards' Nurses Award — Document 2017 — registered on 6 October 1988. The legal parameters to which we immediately refer are, of course, those parameters which govern the processing of a contended grievance of a member by his/her union; and
- (iv) she (Mrs Denford), at the time the association was "requested to pursue the grievance" — the emphasis is ours — within the setting of section 216(1) of the Act, was a union member. This formal request, we find, occurred on, or subsequently to, 31 March 1989 when she (Mrs Denford) — as Mr Warr deposed — arranged, both personally, and initially through her solicitor, to be interviewed in relation to her contended grievance, the date of interview being scheduled for 11 April 1989 by the Canterbury organisers for the

association. What occurred earlier through Mrs Denford's communications with Ms Payne-Harker and/or through her solicitors in their approaches to the association, did not, in our view, for reasons we have earlier herein expressed, comprise a formal request or requests by Mrs Denford and/or her solicitors on her behalf, that the association should pursue her contended grievance.

We now turn to the association's contention/s that Mrs Denford could only become a category "B" member of the association when she rejoined it. This contention was first made by the association immediately prior to the commencement of this hearing on 31 July 1989. We do not accept this submission. "Worker" is defined in section 2(1)(b)(ii) of the Labour Relations Act as including "a person intending to work: ...". Section 60 of the Act explicitly provides:

**60. Right of workers to become members of unions** — Subject to the provisions of this Act, every person who, by virtue of that person's work or intended work, is within the coverage of the membership rule of a union shall be entitled to be admitted to membership of the union and on application the union shall admit such a person to membership; and so far as the rules of any union are inconsistent with the provisions of this section they shall be null and void.

We emphasise, in the context of section 60 of the Act, the qualification of "intended work". This section, of course, overrides the provisions of any membership rule of a union which is inconsistent with it. Indisputably, on 31 March 1989, Mrs Denford intended to work for the board as a nurse, notwithstanding her dismissal, and certainly intended to work in future as a nurse if she could not secure reinstatement to the board's employment through the pursuit of her contended personal grievance.

Mr Robson focuses upon the expression "engaged to be employed" as it concerns the various categories of nursing in the category "A" membership rule of the association. The expression "engaged to be employed" also, of course, appears in relation to category "B" membership in the association. Mrs Denford, we conclude, was and is able to compellingly contend that, from 31 March 1989, she intended to be re-employed by the board as a nurse — and thus work for the board. She is able to further compellingly contend that at this time her eligibility/status under section 60 of the Labour Relations Act was to category "A" membership of the association. The more restrictive qualification in the setting of the membership rule, "engaged to be employed", is apparently inconsistent, we consider, with the expression "intended work" provided for by section 60 of the Act and as it clearly applied to Mrs Denford's situation.

In our view, for the reasons which we have simply summarised, we conclude that Mrs Denford should be treated, certainly from the time her application to rejoin the association was forwarded by post on 31 March, as a category "A" member of the association. In short, without prolonging this already lengthy judgment, we find that there is no substance in what we describe as the first two threshold issues advanced by the association, which it is submitted, upon thoughtful analysis, disqualifies Mrs Denford in a grievance setting.

The final preliminary issue concerns, of course, the association's contention that, within the setting of section 218(1)(a) of the Act, Mrs Denford has not shown/proved that the association failed to act and/or failed to act promptly for her in her contended grievance setting.

We uphold the association's submission in this immediate setting. We firmly conclude, for reasons we have previously herein expressed, that the association dealt conscientiously and purposefully with Mrs Denford's contended grievance until it (the association) justifiably — and in our view reasonably so — decided

not to progress the contended grievance further. Mrs Denford was notified of the association's decision in writing on 20 April (exhibit "O" refers).

We have closely considered the detailed submissions of Mr Forbes in this setting. We are satisfied that the association's decision to proceed no further with the contended grievance was a decision both carefully reached, and for reasons reflecting no error of substance concerning the considered perception/evaluation of the dismissal and associated events in both substantive justification/lack of justification and procedural fairness/unfairness settings.

Following the approach which has repeatedly been approved in a leave setting by both this Court and its statutory predecessor, the Arbitration Court — and very recently endorsed by the Court of Appeal in *Johnston's* case (supra) — we conclude that we should "not lightly disturb a reasoned and considered decision by a union in full possession of all material facts". We perceive no sufficient reason/s, after our full and reflective consideration of the material evidence, to override the association's decision, which was expressed to Mrs Denford through Mr Warr on 20 April 1989, not to proceed further with Mrs Denford's contended grievance. In short, the association's decision impresses us as justly appropriate in the material circumstances of the case, viewing the dismissal from the twin perspectives of substantive justification and procedural fairness.

For the reasons expressed, we find that Mrs Denford has not shown/proved, in the context of section 218(1)(a) of the Act, that the nurses association, in which she was at the material time a category "A" member, failed to act and/or to act promptly in relation to her contended grievance. We now accordingly, formally decline leave to Mrs Denford to have her grievance heard and determined by this Court upon her direct application to the Court.

(b) The Contended Grievance, viewed upon the Merits:

If we had concluded that leave should have been granted to Mrs Denford, pursuant to section 218(1)(a) of the Act — which, of course, we have not — then it is appropriate, we consider, that we should now state how we would have determined the contended grievance. We would, in this event, we now confirm, have upheld Mrs Denford's dismissal by the board as substantively justified and not vitiated by procedural unfairness which would cause us to set aside the dismissal. We have already, during this judgment, emphasised our acceptance of the seriousness of what occurred on 29 January 1989 concerning Mrs Denford's material care and management of Mr Youngman, as the board's patient. We are satisfied, we observe, that it was Dr Fairgray who, consonant with his statutory delegated authority, decided to dismiss Mrs Denford — and did dismiss her — and that Dr Fairgray's role in the decision and preceding hearing, both on 20 March and materially subsequently was not vitiated, as Mr Forbes submits, by the role/function exercised by the chief nurse for the board. Her role impressed us as being essentially a consultative role only to Dr Fairgray, the "decision-maker".

We feel constrained, however, to observe that, if we had dealt with the intended grievance upon the merits, we would, in upholding Mrs Denford's dismissal, have indicated to the board — but short of a formal recommendation contemplated by section 227(d) of the Act:

- (i) It was and is an acknowledged fact that Mrs Denford is a nurse of sustained experience who is very highly regarded — for compelling reasons — as a nurse of commanding stature, except for the very grave lapses which led to her dismissal; and
- (ii) Our view that, given what we consider is the unlikelihood of similar lapses in future by Mrs Denford, if re-employed by the board, that earnest consideration should be given to re-employment of Mrs Denford by the board upon her renewed application made on or after 21 March 1991. The board, of



course, would need to evaluate Mrs Denford upon such application as a prospective employee.

We observe in this immediate setting that Mr Brandts-Giesen informed us that the board, upon instructions which it had given to counsel, did not perceive that Mrs Denford should never be re-employed by it, but considered that such re-employment would be inappropriate within a period of months from her dismissal, rather than following a period of years from the dismissal. Counsel was quite unspecific as to what period of years the board would regard as appropriate in the abstract. Two years from the dismissal would, we consider, be appropriate in this context, and we would have so informed the board had we dealt with the grievance upon the merits. Given the lengthy hearing and the depth of evidence which we have heard, we consider it is still useful that the views of this Court in this immediate setting should be made known to the board, the nurses association and to Mrs Denford.

Costs:

We have closely considered the applications for costs which have been made by Mr Robson and Mr Brandts-Giesen. We have concluded, in the particular circumstances of this case, that no orders in a costs setting should be made, and none are made accordingly.