1981 No. 2846P

THE HIGH COURT

BETWEEN:-

INSPECTOR OF TAXES ASSOCIATION

Plaintiff

- and -

MINISTER FOR PUBLIC SERVICE, IRELAND
AND THE ATTORNEY GENERAL

Defendants

Judgement of Mr. Justice Murphy delivered the 24th day of March 1983.

There is in existence a scheme of conciliation and arbitration the express purpose of which is:-

"to provide means acceptable both to the State and to its employees for dealing with claims and proposals relating to the conditions of service of civil servants and to secure the fullest co-operation between the State, as employer, and Civil Servants, as employees, for the better discharge of public business".

Such a scheme has been in existence since the 8th of April, 1950 and its present form represents a version revised as of the 31st

March, 1976 with some additions and alterations made subsequent to that date. I will refer to this scheme as the "C. & A. Scheme".

The original C.& A Scheme was not proved in evidence but instead I was referred to an agreed copy of the material parts of the document and reference was made to the decision of Kenny J. in McMahon & Anor. -v- The Minister for Finance & Others (1962 No. 1328P) to explain the history and effect of the conciliation and arbitration scheme. At page one of the transcript of his unreported judgment he comments as follows:-

> "After lengthy negotiations the first scheme of conciliation and arbitration for Civil Servants was completed on 8th April 1950 it took the form of an agreement between the Minister for Finance and a number of Staff Associations which represented groups in the Civil Service."

At page 50 of the transcript he expressed his decision as to the legal nature of the arrangement. I fully concur in the conclusion which he reached and I gratefully adopt the terms in which it was expressed as follows:-

> "I come now to consider the disputed question on the interpretation of the scheme. Throughout the case the

Plaintiffs Counsel have referred to it as "a Statutory Scheme" with the implication that it has been confirmed by Statute or that it has in some undefined way the force of Statute.

Section 17 of the Civil Service Regulations Act 1956 seems to me to be intended to give the Minister for Finance power to make schemes or contracts for the regulation of Civil Service pay: it is a Section which enables the Minister to make schemes or contracts (I think this is what "Arrangement" means) but it does not follow that an arrangement made by the Minister is a "Statutory Scheme" or a "Statutory Arrangement". The scheme is a contract and nothing more".

In relation to the present case it seems to me that the salient features of the scheme of conciliation and arbitration included the following:-

(1) In accordance with the provisions of clause 4 of the scheme there is excluded therefrom a number of categories of Civil Servants either by reference to specified grades or emoluments. It is agreed that those excluded comprise (among others) Inspectors of Taxes (higher grade).

(2) Only Civil Service Staff Associations recognised by the Minister

for the Public Service for the purposes of conciliation and arbitration are entitled to take part in the operation of the scheme.

(3) The scheme does not in express terms confer the right on any Civil Servant or Association of Civil Servants to seek or obtain recognition and the procedures with regard to applications for that purpose appear to be expressed for the greater part in negative or restrictive terms as follows:-

(a) Before any Staff Association can be recognised for the purpose of the scheme it must make application for recognition by the Minister for the Public Service.

(b) In the case of an association representing departmental classes serving in one Department only the application must be made through the Department in which the classes are serving.

(c) Applications for recognition by associations representing classes other than departmental classes must be made to the Department of the Public Service.

(d) The application for recognition must be accompanied by a statement signed by the officers of the association

concerned showing that the association is not affiliated to or associated with any political organisation.

(e) Recognition will not be granted ordinarily to any Staff Association associated with any politican organisation.

(f) The application must also be accompanied by copies of the rules of the association, particulars of its membership and other "relevant information". Subsequent amendments must likewise be notified to the Minister.

(4) The scheme provides for the creation of a General Council. The main features of that Council are as follows:-

(a) It is composed of a chairman nominated by the Minister for the Public Service together with not more than five other official representatives as well as a principal staff representative and not more than five other staff representatives.

(b) A panel of staff representatives to be formed to which representatives of recognised associations or groups of associations (I take this to mean groups of recognised associations) are appointed which relates the number of representatives to the number of members

in the relevant associations.

(c) The function of the general council is to discuss the various matters specified in Clause 23 of the Scheme which include certain matters to which I advert in particular largely because of the terminology used therein:-

(I) Principles governing recruitment to general service classes and to professional, scientific and technical classes common to two or more Departments.

(II) Claims relating to general service classes and to professional, scientific, and technical classes common to two or more Departments in relation to pay and allowances, overtime rates, subsistence allowances, travelling lodging and disturbance allowances and removal expenses.

(III) Principles of promotion in the general service classes and in professional, scientific, and technical classes which are common to two or more Departments

(IV) General considerations in regard to the grading of general service classes and of professional, scientific and technical classes, common to two or more Departments; claims for grading of posts and blocks of work involving general service grades where the changes in grading involved would have service-wide implications.

(V) Claims relating to establishment of a proportion of unestablished general service and professional, scientific and technical classes, common to two or more departments.

(5) The scheme also provides for the creation of departmental councils and the salient features of that provision are as follows:-

(a) Each departmental council consists of a chairman nominated by the Minister having charge of the Department and not more than three other official representatives together with a principal staff representative and not more than three other staff representatives.

(b) The subject appropriate for discussion by departmental

councils include the following:-

(i) Principles governing recruitment to departmental classes.

(ii) Claims relating to departmental classes only in relation to pay and allowances, overtime rates, subsistence allowances travelling, lodging and disturbance allowance.

(iii) Allowances and claims for allowances of purely departmental application payable to general service grades and professional, scientific and technical classes.

(iv) Principles governing promotion of members of departmental classes.

(v) Claim for grading of posts and blocks of work.

(6) The other organ created by the scheme of conciliation and arbitration is the arbitration board. The main features relating to the arbitration board are as follows:-

(a) It is composed of a chairman: two Civil Servants nominated by the Minister for the Public Service for the hearing of each case and two Civil Servants (or officials) nominated by the staff panel of the general council for the hearing of each case.

(b) Whilst the question of arbitration is not in issue in the present proceedings the language used in Clause 58 of the scheme is material and accordingly I quote that clause in full as follows:-

"58 (1) Subject to the remaining sub-paragraph of this paragraph, only such staff claims as are made on behalf of a grade or grades comprehended by this scheme and represented by a recognised staff association are appropriate for reference to the arbitration board.

(2) A claim on behalf of a section of a grade may be regarded as appropriate for reference to the arbitration board where:-

(a) (I) Differentiation exists between the conditions of service (excluding duties) of such section and those common to the rest of the grade or

(II) The duties of such section are superior in quality to the highest duties appropriate to the grade or

(III) The Minister for the Public Service is satisfied that differentiation exists between the

method of recruitment to the Civil Service for such section and that of the rest of the grade and

(b) The claim arises out of such differentiation or of such superior duties"

(c) Under Clause 61 of the Scheme where a claim becomes referable to the Arbitration Board it is the staff association recognised as representing "the class or classes of Civil Servants concerned" or the Minister for the Public Service may request arbitration.

There was in 1952 - and there is now - a Staff Association known as The Association of Inspectors of Taxes (AIT). By letter dated the 1st day of August 1952 AIT applied through the Revenue Commissioners for recognition under the then C & A Scheme and attached to that letter the documents then - and now - required to be included in an application for recognition. By letter dated the 8th August, 1952 the Minister for Finance granted such recognition in respect of Inspector of Taxes and Assistant Inspector of Taxes which

were in his letter designated as "grades". Subsequently on the 18th September 1952 AIT sought recognition of certain members of that association above the amalgamated grade of Inspector and Assistant Inspector of Taxes but were outside the scheme of conciliation and arbitration. On the 13th April, 1953 the Minister for Finance granted the application in so far as it related to Inspectors of Taxes (higher grade) and senior Inspectors of Taxes both of which offices or groupings were in his letter again designated as "grades".

In the year 1980 the Plaintiff Staff Association (ITA) was formed to represent the Inspectors of Taxes who were in the rules of that association defined as meaning an individual who:-

(a) Has attained the required standard in the preliminary commission examinations and who has received a commission or who is awaiting a commission from the Minister for Finance or

(b) Is at present pursuing a course of study which includes the preliminary and commission examinations but who has not yet completed the course of study or

(c) Those recruited as an Accountant and is serving in the Superintending Inspectors Branch in that capacity".

On the 7th July 1980 ITA applied through the Revenue Commissioners for recognition of that association under the C & A scheme and enclosed with their application the documents prescribed by the rules of the scheme. On the 27th November, 1980 the Department of Finance wrote to the ITA stating (among other things) that:-

"You will be aware that under the procedures applying in the Civil Service recognition is afforded to associations/unions only in respect of grades one association/union only being recognised for any particular grade. This department is not therefore prepared to grant recognition to any association whose constitution would deny membership to sections of the grades it purports to represent. On those grounds the grant of recognition to the ITA can not be favourably considered".

And also

"As regards your letter of the 26th November, 1980 requesting copies of the forms of recognition granted to the Association of Inspectors of Taxes in respect of the various grades of Inspector of Taxes I cannot supply you with copies of these documents. I can, however, confirm that the Association of Inspectors of Taxes holds recognition for the purposes of the scheme of conciliation and arbitration for the Civil Service in respect of the grade of Inspector of Taxes and recognition outside the scope of the scheme in respect of the grades of Inspector of Taxes, higher grade, and Senior Inspector of Taxes".

On the 13th March, 1981 these proceedings were instituted and in the Plenary Summons the Plaintiffs claimed in effect a declaration that it was an association representing departmental classes and that the Minister was bound to recognise the Plaintiff as such an association. However the relief sought by the Plaintiff is more particularly set out in the Statement of Claim where the following

relief is sought:

(a) A declaration that it is an association representing departmental classes serving in one department only within the meaning of the scheme of conciliation and arbitration for the Civil Service.

(b) A declaration that the first named defendant is bound pursuant to the said scheme properly to consider affording recognition to the Plaintiff as such an association.

(c) An order that the first named Defendant do properly consider affording recognition to the Plaintiff as such an association.

(d) A declaration that the first named defendant's failure to afford such recognition to the Plaintiff is wrong in law and null and void and of no effect.

(e) A declaration that Inspectors of Taxes within the meaning of the expression "Inspector of Taxes" as defined in Section 1 of the Income Tax Act 1967 are a separate and distinct grade and a separate and distinct class within the Civil Service".

Counsel for the plaintiffs in opening submitted that the crucial question in this case is, "What is an Inspector of Taxes?" or, perhaps more correctly, "What is an Inspector of Taxes properly so called?" Subject to minor modifications the plaintiffs contend that the answer to this question is that an Inspector of Taxes properly so called is a person who has been appointed an Inspector of Taxes by the Minister for Finance under section 161 of the Income Tax Act 1967. The case made by the defendants, though not expressed in those terms, might be summarised by saying that they postulate the question "Of what does the grade of Inspector of Taxes consist?" The defendants then contended that this question should be answered along the following lines:

> "The grade of Inspector of Taxes and any other grade in the civil service consists of those persons or officers whom the appropriate Minister - the Minister for Public Service - has in the exercise of his discretion under section 17 of the Civil Service Regulation Act 1957 appointed to that grade for whatever reasons of administrative convenience or expediency he thinks fit."

Before 1959 there was no danger of confusion as to what constituted an Inspector of Taxes. At that time Section 75 of

the Income Tax Act 1918 provided that:

> "The Treasury (subsequently the Minister for Finance) may appoint inspectors and surveyors and all such inspectors and surveyors and all other officers or persons employed in the execution of this Act shall observe and follow the orders instructions and directions of the Revenue Commissioners." .

In fact the office of Inspector of Taxes had existed for more than a hundred years in 1959. It must have been one of the best known offices in the public administration. Traditionally vacancies were filled by open competition at the university graduate level: successful candidates are given additional specialised training and promotion opportunities are within the Revenue Inspectorat Without seeking to demean or diminish any other post counsel on behalf of the plaintiffs sought to establish the importance of the work done by what I may describe as "the traditional Inspector of Taxes"; the high calibre of the candidates appointed to that post and the public regard in which these officers are properly held.

The Income Tax Act 1967, consolidating the Income Tax Act 1918 with the income tax provisions of the numerous Finance Acts thereafter

contains over a hundred references to the office of Inspector of Taxes or the powers conferred on that officer. There is no doubt but that the references are to an Inspector of Taxes within the meaning now of the 1967 Income Tax Act and previously to the Income Tax Act 1918. That is to say the functions and statutory powers referred to in those Acts are and were exercisable only by an Inspector of Taxes appointed as such by the Minister for Finance under section 161 of the Income Tax Act 1967 (previously section 75 of the Income Tax Act 1918) and not by any other person. Many of these are extremely important powers and require for their proper exercise first a high degree of skill and knowledge and secondly an unquestioned intergity. It was contended on behalf of the plaintiffs and not disputed by the defendants that the traditional Inspector of Taxes had achieved, in fact, and was publicly recognised as having achieved the skill and integrity required for the discharge of his duties. Indeed, it would be difficult for anybody engaged in the legal professions to dispute the high regard in which the traditional Inspectorate is held and the obvious contribution which successive Inspectors of Taxes have made in arguing and presentin

complex legal problems arising in the tax code before the Appeal Commissioners and the Circuit Courts over very many years. It would not be unreasonable for those who inherit a proud tradition to seek to preserve it unchanged both as a matter of professional pride and for the commercial advantages which may flow to the holders of that office both inside and outside the public service from such a reputation.

The enactment of the Finance Act (No. 2) 1959 and more particularly the making of the Income Tax (Employments) Regulations 1960 affected materially the mode and volume of work to be undertaken by the staff of the Revenue Commissioners in relation to those tax payers who, prior to that date, had been taxed pursuant to assessment made under Schedule E. As had been recommended by the Commission on Income Tax appointed on the 18th day of February 1957 this legislation and the regulations made thereunder were introduced to extend the tax collection system generally known as P.A.Y.E. from the public sector to which it had previously applied to all employees. It

was clear that this extension would create very considerable procedural and administrative difficulties particularly during the transition period. Proposals as to the staffing requirements needed to cope with these problems were set out in a letter dated the 26th February 1960 from Mr. (later Commissioner) Richardson to the secretary of the Department of Finance. From that letter I quote one paragraph in full as follows:-

> "Schedule E work has hitherto been assigned to clerical staff to the greatest extent possible. In view of the difficulty of obtaining and training Inspectors for the more complex and technical Schedule D work it is considered that this policy should be continued and extended. It is, therefore, proposed that the Inspectors and higher grade Inspector required for Schedule E work should be recruited by selection from the existing Taxes clerical grades. In order to distinguish them from the technical Inspectorate, it is considered that they should from the outset be constituted as separate grades to be known as Clerical Inspectors and Higher Clerical Inspectors, respectively".

These proposals were the subject matter of a discussion between senior officers of the Revenue Commissioners and senior officers of the Department of Finance on the 10th March 1960. The memorandum of

the discussion which took place on that date is helpful in as much as it clearly records that the Revenue Commissioners were seeking the creation of a "new type of Inspector". He would be recruited from the clerical grades and work as theretofore in the Schedule E area where the work was described as being of a routine nature but the officers selected would require to have the administrative and legal status of Inspector. Presumably this was the reason for selecting the title "Clerical Inspector". It was emphasised that the Clerical Inspector would be a separate grade as interchangeability with the traditional Inspectorate would be unacceptable to the Revenue Commissioners. Indeed, the general relativity of the two offices may be summarised by quoting the final sentence of paragraph of that memorandum as follows:-

> "A great deal of this work will be routine but must be dealt with finally by an Inspector - hence the proposal to use Clerical Inspectors instead of more valuable technical Inspectors."

On the 19th March 1960 the Minister for Finance rejected the proposal to create the proposed new grades and explained his reason

as follows:-

> "The Minister considers it undesirable to add to the already large number of civil service grades unless where this is clearly necessary in interests of efficiency of administration. He has considered your proposal to create two new grades to be known as Higher Clerical Inspector of Taxes and Clerical Inspector of Taxes but in view of the small number of posts involved and of the fact that the nature of the work to be performed is broadly similar to that appropriate to members of the Inspectorate of Taxes he considers that the posts in question should be filled from the existing grades".

In accordance with that decision and the sanction they conveyed therewith the Revenue Commissioners invited applications from the tax clerical grades for four posts of Inspectors of Taxes who were to be designated as "Clerical Inspector posts".

The circular inviting those applications (Circular E.1600) was immediately the subject matter of adverse comment by the traditional Inspectors of Taxes and their association the A.I.T. The complaints made by the A.I.T. may be summarised as follows:-

1. That the Clerical Inspectors would lower the status of the Inspectorate because they would be within the

Inspectorate and yet possess no technical qualifications and perform duties of a lower grade than those ordinarily carried out by Inspectors of Taxes;

2. There was a danger that the Clerical Inspectors would encroach upon the higher grades and senior posts within the Inspectorate to the detriment of the job opportunities of the existing Inspectors;

3. The title of "Inspector" accorded to the new appointees would lower the status of the existing Inspectorate.

It is interesting to see how these complaints were dealt with as recorded in the notes of the interview which took place on the 23rd March 1960 between the representatives of the A.I.T. and the then Chief Inspector of Taxes.

The views of the Chief Inspector as summarised from that minute are as follows:-

1. The name given to the new appointees was of no significance.

2. The new appointees would not at any point impinge on the work or the structure of the technical (or traditional) Inspectorate.

3. There was no reason to suppose that the appointment of five men to these posts - and that was the total number then envisaged - could cause any significant problem.

4. That in the event of future developments affecting the structure of the Inspectorate their representatives would be

given an opportunity of making their representations to the Chief Inspector.

Whilst nobody has or could challenge the integrity of the officers who argued against the case made by the traditional Inspectora in 1960 it is now easy to see with the benefit of hindsight that the fears expressed by the Inspectorate were indeed well founded. The designation of the new post as "Clerical Inspector" has, to say the least of it, caused considerable confusion. Sometimes this was referred to as Inspector of Taxes (P.A.Y.E.); sometimes as Clerical Inspector of Taxes and more recently as Inspector of Taxes (Non-Technical). The traditional Inspector of Taxes is now generally referred to as an Inspector of Taxes (Technical) and is sometimes referred to as a Commissioned Inspector of Taxes distinguishing him from all other Inspectors by reference to the commission which he holds from the Minister for Finance under section 161 of the Income Tax Act 1967. The number of Non-Technical Inspectors has expanded rapidly in comparison to the Technical Inspectorate. By 1972 there were 54 Non-Technical Inspectors as against 47 Technical Inspectors and by 1980 there were 208 Non-Technical Inspectors as

against 102 Technical Inspectors. Clearly the views which the official side had put forward in response to the complaints made by the traditional Inspectorate in 1960 to the effect that the numbers involved in the new office were so small as to be insignificant has lost the validity which it once had. Finally it can be seen that the Non-Technical Inspectors have represented that the higher posts should be open to them as they are to the Technical Inspectors. Indeed, proposals have been made to eliminate what is now described as "the two streams" within the Inspectorate so as to provide the same job opportunities for each type of officer.

Whether the Minister's decision taken in 1960 in relation to the Inspectorate and the staffing thereof would be considered wise and prudent in the light of the facts as they were then anticipated or indeed with the benefit of hindsight is not for me to decide. What the evidence - particularly the evidence of Mr. Fitzgerald - clearly established and what was confirmed by the correspondence put in evidence was that the Minister then concerned unequivocally rejected the proposal made by the Revenue Commissioners to create a new grade of Inspector of Taxes between the levels of Higher Tax

Officer and the traditional Inspector of Taxes. As I accept that evidence without reservation, then the Non-Technical Inspectors cannot constitute a separate unique grade unless a grading is something which can come into existence spontaneously and by the nature of the task performed by the office holders rather than a conscious decision of the Minister involved.

What then is a grade? In relation to this crucial question I was referred to the decision of the Court of Appeal in England in Cocker .v. Sheffield City Council 34 Butterworth's Workmen's Compensati Cases page 71. In that case the Court of Appeal had to determine whether an injured workman had changed his grade during the twelve months prior to the accident in respect of which compensation was claimed under the Workmen's Compensation Acts.

The passage on which the plaintiffs here would seek to rely is, in fact, a quotation from the decision of Hamilton, L.J., in Barnett .v. Port of London Authority 1913 2 K.B. 115 at 128 as follows:

> "The legal meaning of the word "grade" is a matter of law; the test by which the existence of a grade may be ascertained are matters of law; but whether a grade exists or not is a question of fact in each case. Grade

or no grade does not depend on the arbitrary nomenclature of single employers apart from all other circumstances, but there may be cases where the classification adopted by a single employer, even among men whose actual work is similar, may amount to a graduation of the men in regard to conditions and regularity of employment and rates of pay so widespread and so distinct as to become within the term "grade" as used in the Act, the similarity of the work and the identity of their generic name notwithstanding."

Applying that principle it was in fact held in Barnett .v. Port of London that "extra casual" dockers who had the same rates of pay and did the same work, when engaged, as other dockers were a separate grade for the reason that the extra casual dockers were not employed until all other dockers had been offered employment. It must be recognized that this decision related to the particular provisions of the Workmen's Compensation Code.

Again, reference was also made to American Jurisprudence Volume 7 at page 1,000 which does indeed provide a definition or description of the terms "grade or class" but it was conceded that the definition provided related exclusively to the specialised context in which the term was used there. As Mr. James Fitzgerald explained in evidence the terms "class" and "grade" are organisational groupings used in th

civil service which existed prior to the 1920's and were taken over in the re-organisation of the civil service at that time. Mr. Fitzgerald was able to say that there are some 950 grades and that 600 of those are represented by 20 associations in the C and A scheme. There are established general civil service classes known as clerical, executive and administrative. There are in addition professional and technical classes. Within the classes there are grades. Obvious examples being Engineers Grade I; Engineers Grade II; Engineers Grade III and so forth. The significant fact, however, of which Mr. Fitzgerald gave evidence is that a person on his appointment within the civil service is employed or appointed to a position in a grade and that this is an organisational matter within the civil service. Indeed this is reflected in the Civil Service Regulations Act 1924 which, having provided in section 3(1) for an inquiry by the Civil Service Commissioners into the qualificati of applicants for permanent situations, went on to provide in sub-section (3) that it should not be necessary to obtain a Certificat of Qualification from the Commissioners in respect of a further appointment "in customary course of promotion from the class or grade

of situation in respect of which Certificate shall have already been issued". What these classes are or may be is, however, a matter controlled by the appropriate Minister (now the Minister for the Public Service) under section 17 of the Civil Service Regulation Act 1956 which, so far as material, provides as follows:-

> "The Minister shall be responsible for the following matters ..... the classification, re-classification, numbers and remuneration of civil servants .....".

It is true that section 17 aforesaid does not refer to the word grading and this omission is in contrast with other provisions of the same Act where that expression is indeed used. It does seem to me, however, that section 17 was intended to give and did effectively give to the Minister the statutory power of making and determining all levels of classification and sub-classification including grading of every description.

In these circumstances I would have no difficulty in answering the question posed by the plaintiffs, namely, "What is an Inspector of Taxes"? An Inspector of Taxes - without qualification - is, in my opinion, a person who holds a Commission from the Minister for

Finance under section 161 of the Income Tax Act 1967 or the earlier legislation which it replaced. Somewhat regretfully, however, it seems to me that this is not the decisive question. It is quite clear that the entire basis of the C and A scheme turns on the effective representation of officers in the civil service by reference to the grades which they occupy. The crucial question is whether the group of officers who are Inspectors of Taxes as aforesaid and readily distinguishable as such form a grade separate from Inspectors of Taxes of any other variety be they known as Inspectors of Taxes (Non-Technical) or Inspectors of Taxes (P.A.Y.E.). The question is "Do these categories form separate grades?", not "Should these categories form separate grades?". The heart of the issue then between the parties is whether the objective existence or otherwise of separate gradings depends upon an examination of the facts such as recruitment education, work levels and promotion prospects of whether the grading is determined by a decision of the appropriate Minister (with or without regard to any such factors).

In the Report of Public Services Organisation Review Group 1966/1969 (frequently referred to as "the Devlin Report") to which both parties referred the following comments appear at page 64:-

"There is, therefore, something arbitrary about what constitutes a grade and we do not propose to go into a detailed analysis of what is essentially an organisational soft area."

And

"We may mention, at this stage, that there is no statutory definition of a grade in the Civil Service Regulation or Civil Service Commissioner's Acts. Persons are appointed to positions in the civil service. Positions with common conditions of service and comparable levels of work and responsibility are grouped into grades under the statutory responsibility of the Minister for Finance for the classification and re-classification of civil servants. In practice grades have evolved over the years. A grade is mainly distinguished by the work its members are required to perform and by common conditions including a scale of pay fixed for it."

It seems to me that each of the above quotations is apposite. First the concept of grade is not readily susceptible of detailed analysis and secondly that in practice and in law a grading is determined by the appropriate Minister and in doing so he has regard to relevant matters such as levels of responsibility, work and pay. Whilst these are, no doubt, appropriate factors for the Minister to consider it is clear from the C & A scheme itself that grading does not necessarily involve or flow from the similarity or identity of these factors in any particular case. As alread mentioned Clause 58(2) of the C & A scheme, in dealing with the circumstan in which a claim to arbitration may be made on behalf of a section of a gr recognises that grades may include officers having different conditions of service, duties superior to others in the grade and different methods of recruitment. In fact counsel on behalf of the defendants submitted that in making decisions in relation to grading - either the creation of a grade or

the appointment of persons to it the Minister was making an administrative decision which was not reviewable in law and which he was entitled to make on the basis of considerations of administrative expediency. In my view that submission is well founded. Clearly as a matter of practice grading decisions may cause dissatisfaction or be seen as unfair to one group or another and presumably this is a factor which the Minister would bear in mind in reaching his decision.

As I have already pointed out it is clear that the Minister clearly and consciously refused to create a new grade consisting of what were then designated as Clerical Inspectors of Taxes. What the Minister did not do is clear. What is less clear is the positive implications of his action. If there was to be no new grade did the new post remain graded with the Higher Tax Officers from which it was recruited? In fact there is support for that view in as much as the Association of Officers of Taxes applied to the Minister for Finance on the 11th December 1960 for recognition of that association as representing "the grades of Inspectors of Taxes (P.A.Y.E.)" on the basis that promotion to that "grade" was restricted to those in the grades at present catered for by that association. In fact this application was refused on the grounds that the inspectorate was already represented by the A.I.T. Again one might have expected that the non-technical Inspectors of Taxes would be appointed to the grade of "Inspector

of Taxes" without further qualification if this had indeed been the decision of the appropriate Minister. At my request sample documents of appointment were extracted and put in evidence at the resumed hearing of t i: matter in December last and from these it appears that indeed on the promotion of a senior tax officer to the new post on the 29th of March, 19 0 he was expressed as being appointed "to the grade of Inspector of Taxes" but with the addition of the words "for the purposes of P.A.Y.E". In a later appointment - made on the 15th December, 1964 - the promotion is described as being "to the grade of Inspector of Taxes" without any qualification.

In more recent years appointments or promotions are described either as "to the grade of Inspector of Taxes (non-technical)" or "to the grade of Inspector of Taxes (technical)" as the case may be. In terms this would appear to identify two differing grades. Mr. Fitzgerald in his evidence was emphatic that there is but one grade within which there are two identifiable streams. Whilst I find it difficult to recognise a concept of "streams" divorced from the concept of "grades" I accept as a fact first that a separate grade was not created in respect of the clerical inspectorate and secondly that the clerical inspectorate was graded in fact by the Minister with the traditional inspectorate and that this decision - whether prudent or otherwise - was made by the Minister as a proper exercise of his

administrative authority. Of its nature it seems to me that that decision is not reviewable by the Court and even if the position was otherwise it must be recognised that the basic decision was taken more than twenty years ago so that it would be unlikely in any event that the Court would in the exercise of its discretion review a decision of such long standing.

The primary relief sought by the plaintiffs in the present case is a declaration that the defendants are bound under the C. & A. scheme to consider affording recognition to them the plaintiffs. The plaintiffs do not suggest that the decision of the Court on a claim for recognition could be substituted for that of the Minister. All that is claimed is that firs the Minister is bound properly to consider the application by the plaintiffs for recognition and secondly that the Court could condemn the Minister's decision if, to use Counsels words, "the decision was plainly wrong".

In relation to this claim the first matter which falls to be considered is the nature of the obligation which it is contended that the Minister owes to the plaintiffs. As the defendants contend it is clear that this obligation does not derive directly, at any rate, from the Constitution. That no such right exists was stated clearly by McWilliam J. in the unreported judgment which he delivered on the 2nd December, 1980 in Abbott -v- Irish Transport and General Workers Union & Ors. in the

following terms:-

> "Although Fitzpatrick's case and Meskill's case have established that citizens have a constitutional right not to be forced to join unions against their wishes the suggestion in the Pleadings that there is a constitutional right to be represented by a union in the conduct of negotiations with employers has not been pursued and, in my opinion, could not be sustained. There is no duty placed on any employer to negotiate with any particular citizen or body of citizens."

If there is no right to recognition or right to negotiate - and I fully agree with McWilliam J. that no such right exists - a fortiori there is no right to recognition for the particular purposes of the particular scheme in the present case that is to say, the C. & A. scheme.

Again the alleged obligation does not arise by virtue of statute. As already pointed out Kenny J. in McMahon and Anor. -v- Minister for Finance made it clear that the C.&A. Scheme is not a statutory scheme but a matter of contract only.

The question which then arises is how far the plaintiff association or its members can take advantage of a contract to which they are not parties. The decision of the High Court in Cadbury Ireland Ltd. and Kerry Co-Operative Creameries Ltd. and Anor. 1982 ILRM 77 was cited by the plaintiffs as

authority for the right of the plaintiffs to maintain an action in contract in these circumstances. It does not seem to me that that decision supports the plaintiffs claim. In fact Barrington J. accepted that the principle for which the plaintiffs contended in that case was the well established proposition that parties to a contract can create a trust of contractural rights for the benefit of a third party and indeed went on to hold that no such trust had been created therein. Similarly in the present case I would find it very difficult to infer that the various Staff Associations who were parties to the original C. & A. agreement purported to contract by implication as trustees on behalf of other associations which might be formed thereafter.

In my view the only basis on which the plaintiffs could rely upon the C. & A. scheme and the contract which constitutes it is on the basis that the members of the plaintiff association are officers or employees of the State whose terms of employment include by implication a provision that each of them shall have the benefit of the contract and scheme in accordance with its terms and provisions. Whilst the facts which would support such an inference were not canvassed in great detail I would be satisfied to accept for the purposes of this judgment that the plaintiffs as representing employees of the State are entitled in contract to have the terms of the scheme implemented by the Minister.

In Dublin Colleges Academic Staff Association & Ors. -v- The City of Dublin Vocational Education Committee & Ors. Hamilton J. in an unreported decision delivered on the 31st day of July 1981 held in relation to the scheme of conciliation and arbitration for teachers first that there was no obligation to recognise any particular organisation for the purpose of that scheme and secondly that the Minister had a discretion as to which organisations he would afford recognition.

It seems to me the high-water mark of the contractural rights of the plaintiff association derived from its members is to have an application made by a staff association fairly considered by the Minister and that this being done his bona fide decision to grant or withhold recognition is conclusive.

In the present case it was indicated on behalf of the Minister at an early stage that the application could not succeed for two reasons first that it was established administrative policy to allow recognition to one association only in respect of each grade and as recognition had unquestionably been granted in respect of the Inspector of Taxes grade to the A.I.T. that the application by the plaintiffs herein would necessarily fail and secondly that the constitution of the plaintiffs was such as to exclude from its membership Inspectors of Taxes (non-technical) and that again it was administrative policy to refuse recognition to any associatio

which did not admit to membership all persons on the grade in respect of which recognition was sought. The claim would likewise be refused on that ground. What the witnesses - and in particular Mr. Fitzgerald - say in relation to this ground is that they looked into the matter and concluded - in my view rightly - that the Inspectors of Taxes properly so called and the Inspectors of Taxes (non-technical) had been appointed to the same grade i.e. the grade of Inspector of Taxes and accordingly the applicants did not qualify for recognition in accordance with established precedent.

It seems to me that the decision so made by the Minister represented a proper discharge of any contractural obligation which he owed to the staff association seeking recognition and accordingly that the Plaintiffs claim herein must fail.

Francis D. Murphy

11/4/83