

THE EMPLOYMENT COURT OF NEW ZEALAND

WHERE IT SITS IN THE COURT STRUCTURE AND WHY

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Christina Inglis, Chief Judge

Labour law is contentious and is subject to ongoing change, sometimes dramatic, as the political pendulum swings. Revocation of the Labour Relations Act 1987, enactment of the Employment Contracts Act 1991, and its subsequent repeal and replacement with the Employment Relations Act 2000, illustrates the point.¹

This politically charged context, along with the significance of the work of the Employment Court to the New Zealand economy and its wide-reaching public importance, may help explain the ongoing challenges to its status and even its existence over time. One example is a paper prepared by the Business Roundtable in 1996, entitled “The Status and Jurisdiction of the New Zealand Employment Court”, which advocated for the Court’s status to be reduced to that of the District Court, or be abolished altogether.² (The paper touches on some of the constitutional impediments that would be thrown up by any such step, and the Roundtable’s proposals were never adopted). In 1997, in a paper provided to a symposium on the current state of affairs in New Zealand employment law, the then Chief Judge noted “an unremitting campaign from some quarters for [the Employment Court’s] abolition.”³

All of this reinforces the need for a deeper understanding of where the Employment Court sits and why, so as to protect it from (including unwitting) undue influence. The key point is not

¹ See the discussion in Margaret Wilson “Review of Developments in Employment Law” AULR 18 (2012) 47 at 49.

² Bernard Robertson “*The Status and Jurisdiction of the New Zealand Employment Court*” (New Zealand Business Roundtable, Wellington, 1996) at viii; cited in Maxine Gay & Malcolm MacLean “Six Years Hard Labor: Workers and Unions under the Employment Contracts Act” (1997) 28 Cal W Int’l LJ 45 at 60. See also Andrew P Morriss “Specialized Labor and Employment Law Institutions in New Zealand and the United States” (1997) 28 Cal W Int’l LJ 145 at 165.

³ TG Goddard “Curial Institutions under the Employment Contracts Act: 1991 to 1997” (1997) 28 Cal W Int’l LJ 103 at 104.

where various interest groups and individuals would like the Court to sit, in terms of its relationship with other Courts, but where it *does* sit as a matter of Parliamentary will.

The ongoing confusion about the place of the Employment Court within the court structure was recently reflected in an exchange in Parliament, when debating the Administration of Justice (Reform of Contempt of Court) Bill. The Bill, as originally drafted, sought to equate the Employment Court with the District Court. The fundamental difficulties with that proposition were identified by the Minister of Justice, Hon Andrew Little, in the following way:⁴

It is the part of schedule 2 that deals with an amendment to the Employment Relations Act, and it is that part of the Act that declares that the Employment Court is to be considered as equivalent in rank to the District Court. *In that provision alone, the Law Commission—who, I understand, drafted that part of the bill—and the member who is now sponsoring it are defying 150 years or thereabouts of history.*

The Minister then described the history of the Court as arising out of the then Supreme Court, staffed by judges of the Supreme Court. He went on to recommend that the proper status of the Employment Court be preserved and left intact. This was supported by the Bill's sponsor, the previous Attorney-General, Hon Chris Finlayson, who accepted that the drafting of the Bill would need to be corrected. He said:⁵

I really appreciated the contribution of the Minister, and I have to say, on reflection, he's absolutely right in what he said about the reference in Schedule 2 "Consequential amendments to other enactments", that refers to the Employment Relations Act 2000 and the categorisation of the Employment Court, in replacement section 196, "(a) as if the court were the District Court;", because, actually, his analysis of the history is quite right: *it is a court which is not part of the District Court system; it's the equivalent for industrial relations matters of the High Court. So that's the first piece of work the Justice Committee will need to do to make sure that the definition of court recognises the Employment Court as a distinct court and not treated as though it were part of the District Court.*

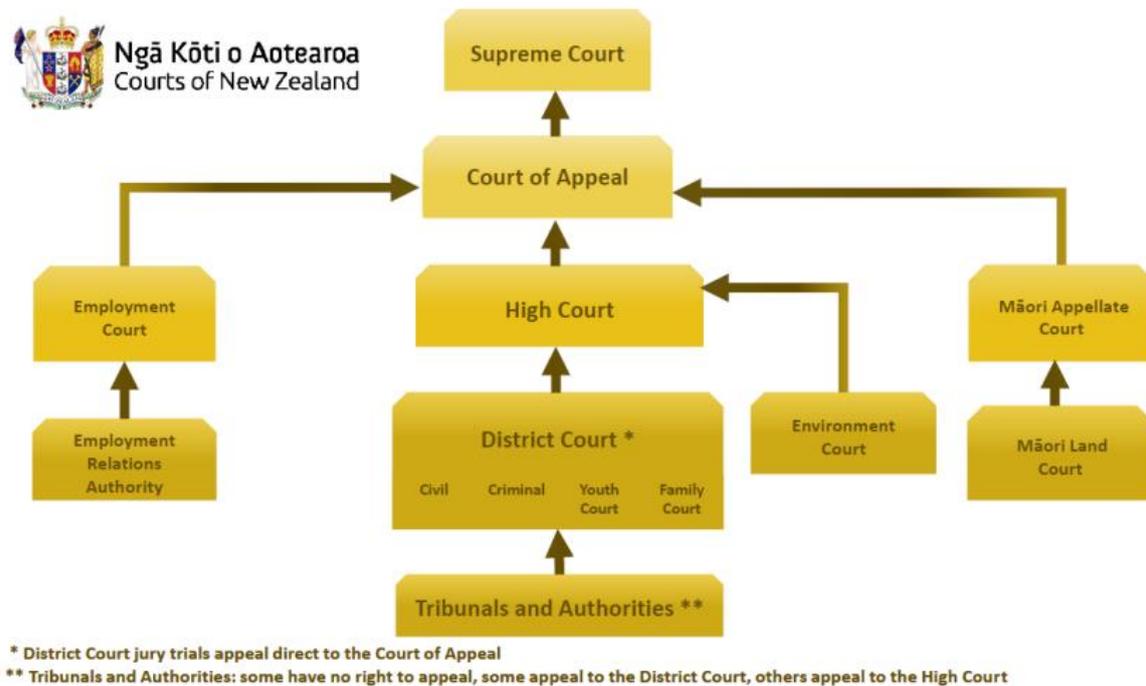
The points made in this exchange echo those made some 50 years ago by the then Minister of Labour, who characterised the Employment Court as having slightly less jurisdiction than, but something of the same status as, the High Court.⁶

⁴ (2 May 2018) 729 NZPD 3393 (emphasis added).

⁵ At 3401 (emphasis added).

⁶ When addressing amendments to the Industrial Relations Act, the Minister of Labour stated: "We see the Arbitration Court as having slightly less jurisdiction than, but something of the same status as, the Supreme Court. There was a suggestion that the right of appeal should be to the Supreme Court, but we have decided to make it to the Court of Appeal" (17 November 1977) 415 NZPD 4582.

The present Court structure as at 2019 is reflected in the following official diagram, which appears on the Courts of New Zealand website administered by the Judicial Office for Senior Courts (www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system/diagram/20190809Courtstructure.pdf). It depicts the Employment Court sitting alongside the High Court (as does the Māori Appellate Court).



As the diagram shows, under the current constitutional arrangements, the Employment Court occupies a place independent of the general courts, in parallel to the High Court (although the Employment Court has a narrower jurisdiction). That reflects the fact that the Employment Court's exclusive jurisdiction to deal with employment matters was carved out of the High Court's jurisdiction. An understanding of this important connection is vital to a proper understanding of the place of the Employment Court in the current structure alongside, and equivalent in status to, the High Court. As is well recognised, the positioning of a Court is important for credibility and effectiveness in its supervisory jurisdiction, and to protect the institutions beneath it.

The importance of the Employment Court's work, as perceived by Parliament, is reflected in a number of ways, including the applicable appellate pathways; the judicial review powers exercisable by the Court (the High Court has no role to play in this regard, and applications to

judicially review the Employment Court must be dealt with by the Court of Appeal); and the ability conferred on the Chief Judge to convene full Court hearings.

Appeal pathways from decisions of the Employment Court mirror those of the High Court but with some notable features:

- Appeals from the Employment Court are to the Court of Appeal.
- There is no general right of appeal. A party must satisfy the Court of Appeal that their case raises “a question of law ... that, by reason of its *general or public importance* or for any other reasons, ought to be submitted to the Court of Appeal for decision.”⁷
- The Court of Appeal has no jurisdiction to hear and determine a question involving the construction of an employment agreement. Such power resides *solely* with the Employment Court, and it is the Employment Court that is the final arbiter in such cases, a role for the Court of Appeal being expressly excluded by Parliament.⁸
- The Court of Appeal *must* have regard to the specialist jurisdiction of the Employment Court in determining any appeal.⁹ The same statutory directive applies to Supreme Court deliberations on an appeal emanating from the Employment Court. As the Court of Appeal observed in *Walker Corp Ltd*:¹⁰

Parliament emphasised the limits of this Court's role in deciding appeals from the Employment Court in 1991 when it required us to have regard to the special jurisdiction and powers of that Court; one aspect of that special character is that it is to decide, not inconsistently with the Act and any collective employment contract, as in equity and good conscience it thinks fit,
...

The starting point for identifying errors of law in this case must be in the broad remedial powers of the Employment Court under the identical provisions, already quoted, of the Labour Relations Act and the Employment Contracts Act, language incorporated in the direction this Court gave to the Employment Court. The parties must point to an error of law in the way in which the Employment Court exercised those remedial powers.

⁷ Employment Relations Act 2000, s 214(3).

⁸ Section 214(1).

⁹ Section 216(a).

¹⁰ *Walker Corp Ltd v O'Sullivan* [1998] 1 ERNZ 256 (CA) at 258-259.

And in *Canterbury Spinners v Vaughan* the Court of Appeal said:¹¹

[1] As this Court has often emphasised, the institutions created over the past century or more to deal with employment matters have special characteristics: eg *Inspector of Awards v Fabian* [1923] NZLR 109 (CA), at p 121, and *NZ Van Lines v Gray* [1999] 1 ERNZ 85; [1999] 2 NZLR 397 (CA), at pp 91-94; pp 402-405. The Employment Relations Act 2000 continues to require this Court when hearing appeals from the Employment Court to have regard to the special jurisdiction and powers of the Court, as well as the object of the Act and of its relevant parts and certain provisions of the Act (s 216). Among those provisions are the equity and good conscience direction to the Employment Court in s 189 and the strong (and now very rare) privative clause protecting decisions of the Court from judicial review in s 193.

[2] The special character of the institutions reflects the legislative judgment that employment relationships and contracts are distinct in law, at least in part, from relationships and contracts seen generally.

The Court of Appeal's jurisdiction to hear and determine applications for judicial review against the Employment Court is the only direct power of judicial review possessed by the Court of Appeal, because that power is otherwise exercised at first instance by the High Court.

The Employment Court is a "Queen's Court" as Lord Cooke observed in *Curtin* (a case involving a dispute as to whether a matter should be heard in the High Court or in the Employment Court):¹²

In the argument for the appellant a good deal of stress was laid on the contention ... that the right of a subject to go to the Queen's Courts [the High Court] should not be taken away. The fallacy in this is the suggestion that the Employment Court is not one of the Queen's Courts. *Clearly it is.*

The statutory power of the Chief Judge of the Employment Court to convene full Court hearings, with up to five judges, reflects a Parliamentary recognition that a number of matters coming before the Court are of such public importance that authoritative statements of the law are desirable.¹³ It also reflects a Parliamentary recognition of the precedent impact of Employment Court judgments and the Court's role in stating the law in this specialist jurisdiction. Several full Court hearings occur each year, generally involving intervenors such as Business New Zealand; the Council of Trade Unions; the Attorney-General and the Human Rights Commission.

¹¹ *Canterbury Spinners v Vaughan* [2003] 1 NZLR 176 (CA).

¹² *New Zealand Couriers Ltd v Curtin* [1992] 3 NZLR 562 (CA) at 565 (emphasis added).

¹³ Employment Relations Act 2000, s 209.

The reality is that full Court judgments set the course for employment relations in New Zealand and have a broad impact in this regard. They are looked to by key players, including business groups, unions, government and others, as well as members of the public. That is because the judgments explain the law, including amendments to the law, to assist people in understanding their obligations and entitlements. As a review of legislative amendments reflects, employment law (more than any other specialist field of law) is subject to constant change, particularly following shifts in the political landscape. Employer obligations relating to pay calculations under the Holidays Act are one (fiscally significant) example. The Court's judgments in such matters as equal pay; sleepovers; KiwiSaver contributions; good faith employment obligations; collective bargaining and disciplinary processes also illustrate the point.

The Employment Court has jurisdiction over all matters of the employment relationship,¹⁴ including basic entitlements such as wages, hours of work, holidays, parental leave and pay equity, as well as interpreting collective agreements and dealing with injunctions over strike action; it has the power to grant compliance orders and search and freezing orders. Its jurisdiction reaches into intellectual property, contract, privacy and company law; interpreting employment arrangements for large, and diverse, groups of people (such as freezing workers, nurses, teachers, port workers, courier drivers, public servants), both collectively and individually. The Employment Court can imprison,¹⁵ sequester property,¹⁶ and ban individuals from employing anyone.¹⁷

In exercising its exclusive jurisdiction, the Employment Court is required to have regard to the inherent unequal bargaining power of parties to employment relationships; to promote observance of the principles reflected in relevant international instruments, including International Labour Organisation Conventions New Zealand is signatory to, and various human rights instruments;¹⁸ to promote good faith dealings within employment relationships; to promote collective bargaining; and to exercise its jurisdiction consistently with equity and good conscience.

¹⁴ The Employment Court has exclusive jurisdiction over 13 aspects of law under s 187 of the Employment Relations Act 2000. The Act expressly provides that “no other court has jurisdiction”.

¹⁵ Employment Relations Act 2000, s 140(6)(c).

¹⁶ Section 140(6)(e).

¹⁷ Section 142M.

¹⁸ For a summary see Margaret Wilson “The Politics of Workplace Reform: 40 Years of Change” in Gordon Anderson (ed) *Transforming Workplace Relations in New Zealand 1976-2016* (Victoria University Press, Wellington, 2017) 44 at 56.

The perceived importance and significance of the work of the Employment Court is also reflected in the following:

- The Employment Court Judges enjoy precisely the same privileges and immunities of office as High Court Judges.
- The appointments process for Judges of the Employment Court is unique in that it involves (by convention) consultation with business and union leaders. This reflects the delicate balance (reflected in the empowering legislation) in industrial relations and which the Employment Court has a pivotal role in protecting.
- The terms and conditions for Employment Court Judges, which cover the use of crown cars, ceremonial regalia, judicial associate support and travel and holidays, are materially identical to the terms and conditions of High Court Judges.
- Retired Judges of the Employment Court usually receive a Queen's honour acknowledging their contribution – through their judicial work – to New Zealand society. High Court Judges, Court of Appeal Judges and Supreme Court Judges are also honoured in this way. Other judges are not routinely honoured in this way.¹⁹

The socio-economic importance of the work of the Court and the employment institutions is summarised in a leading text (“Employment Law in New Zealand”) in the following way:²⁰

Employment law, perhaps more than any other field of law, is the area that ... has the most obvious, continuing, daily impact on people's lives. It is from employment that, directly or indirectly, the great majority of New Zealanders derive their economic security ... At its most fundamental, employment is the means whereby the majority of New Zealanders secure access to the material conditions of life. But, as Reich has pointed out, a job is not just a job:

Today more and more of our wealth takes the form of rights or status rather than tangible goods. An individual's profession or occupation is a prime example. To many others, a job with a particular employer is the principal form of wealth. A profession or a job is frequently far more valuable than a house or bank account, for a new house can be bought, and a new bank account created, once a profession or job is secure.

¹⁹ Occasionally a District Court Judge will receive an honour in recognition of their service. This is the exception rather than the rule.

²⁰ Gordon Anderson, John Hughes & Dawn Duncan *Employment Law in New Zealand* (2nd ed, LexisNexis NZ Ltd, Wellington, 2017) at 1 (footnotes omitted).

On an average day in New Zealand over 2,000,000 New Zealanders will go to work, the vast majority as employees. Of these, about 800 will leave or change their jobs and about 10 will be involved in some form of employment mediation. One worker will suffer a serious injury, two will die of a work-related disease, and every third day another will die as a result of a work-related accident. Employment law is the field of law that regulates the working life of these employees. It defines the mutual obligations between them and their employer, regulates the conditions under which work is performed, and sets the rules that regulate access to employment and exit from it.

The Employment Court plays a pivotal role in maintaining and promoting industrial stability in New Zealand, including by way of considered judgments and via often complex and demanding judicial settlement conferences. The waterfront strikes, and the social upheaval which occurred in 1951 (during which a state of emergency was declared and the Prime Minister described New Zealand as being “at war”), provide a graphic example of why such work is important on a national level. This is not just historical. The long-running and bitterly fought Ports of Auckland dispute of recent times, which threatened to bring the port to a standstill, provides a contrast, in no small measure because of the active involvement of the Employment Court in dealing with the dispute and the litigation arising out of it (including by way of alternative dispute resolution processes).

The role of the Court has been steadily expanded by statute over the years, and there have been no legislative shifts signalling a diminished role. The Senior Courts Act 2016 and the District Courts Act, coming out of the reform of the Judicature Act 1908, do not change the status of the Employment Court. The likely reason why the Senior Courts Act did not substantively refer to the Employment Court is because the Employment Court sits, and has always sat, independently in the Court structure.²¹ It remains as it has always been – a specialist Court with exclusive jurisdiction carved out from the jurisdiction previously enjoyed by the High Court, and off to the side of the general Courts. There is nothing in the pre-legislative material to suggest that the Senior Courts Act was intended to affect the status of the Employment Court, though some aspects of the Judicature Act reform, out of which came the Senior Courts Act, applied to the Employment Court. That this is so reinforces that Parliament intentionally chose not to alter its status.

²¹ Note that the sole reference to the Employment Court (in s 102) of the Senior Courts Act appears to be in error, there being no reference in that provision to any other specialist Court, including the Māori Appellate Court and the Māori Land Court (two other specialist Courts, whose positioning within the Court structure can be seen in the above Ministry of Justice diagram of New Zealand’s court structure). Nor is there any substantive reference to the Employment Court in the pre-legislative material. Section 102 did not appear in the original version of the Bill. Rather, it was inserted without explanation following the Select Committee process. No submissions appear to have been made in relation to it.

The following important points can also be noted:

- From 1895 until about 1920, Judges of the Court of Arbitration held contemporaneous appointments as Judges of the then Supreme Court.
- The change to specialist Judges occurred in 1921 and was said to have “improved” public confidence in the Court. It has been observed that the move to specialisation was not accompanied by a loss of status but, rather, was for the purposes of ensuring a selection of more appropriately qualified Judges to deal with employment matters.
- From 1973 the right to appeal was from the Arbitration Court direct to the Court of Appeal, and not to the High Court.²² This has never changed.
- From 1987 the jurisdiction of the Court was substantially expanded. The personal grievance jurisdiction (previously dealt with by grievance committees) was broadened to include discrimination, sexual harassment, duress and unjustified disadvantage. Cases relating to strikes, lockouts and picketing were transferred from the High Court to the Labour Court. The Court was also given the power to issue compliance orders and the power of judicial review (hitherto only possessed by the High Court). That expanded jurisdiction remains with the Employment Court today.
- From 1987 the jurisdiction of the Court became exclusively judicial in character. No lay members sat on the Court from this time. The position can be contrasted, for example, to the Environment Court which does sit with lay members.
- In 1988 the State Sector Act brought the public service and the education service under the Labour Court.
- In 1991 with the enactment of the Employment Contracts Act, there was a further transfer of jurisdiction from the High Court when all employees became able to take personal grievances against their employers, regardless of union membership and levels of remuneration.

²² Industrial Relations Act 1973, s 62A.

It is perhaps unsurprising that the move to a less regulated economy has had a substantial impact in terms of the significance of the Court's work (as a reading of the texts on the history of labour law in New Zealand reflects).²³ Reference can be made to two recent examples to illustrate this point:

- *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes Ltd* – the equal pay case – Business New Zealand argued that the move away from wage fixing meant that the Equal Pay Act could not be interpreted as allowing the Employment Court to consider a claim for equal pay by a rest-home worker wishing to compare her pay to the pay received by male-dominated workforces. Business New Zealand failed in its argument before the full Court of the Employment Court, whose judgment was subsequently upheld by the Court of Appeal.²⁴
- *Prasad v LSG Sky Chefs New Zealand Ltd* – which dealt with the growth of triangular relationships and the extent to which businesses can escape the reach of employment laws by entering into labour-hire arrangements with a third-party. The full Court's judgment finding that they could not, in the circumstances of the case, was subject to an application for leave to appeal to the Court of Appeal. That application was declined.²⁵

In addition, recent statutory amendments in relation to the minimum standards regime confer expansive (and draconian) powers on the Court, including the power to ban a company and its directors from employing employees at all.²⁶ Such powers are unprecedented in the history of New Zealand's labour law. There have also been recent legislative developments in relation to tripartite employment, and further (potentially far-reaching) and imminent legislative change has been signalled by the Labour-led government (for example, in relation to fair pay agreements).²⁷

²³ See, for example, Anderson, above n 17.

²⁴ *Service and Food Workers Union Nga Ringa Tota Inc v Terranova Homes and Care Ltd* [2013] NZEmpC 157, [2013] ERNZ 504; *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZCA 516, [2015] 2 NZLR 437. Leave to appeal was declined by the Supreme Court: *Terranova Homes & Care Ltd v Service and Food Workers Union Nga Ringa Tota Inc* [2014] NZSC 196.

²⁵ *Prasad v LSG Sky Chefs New Zealand Ltd* [2017] NZEmpC, (2017) 15 NZELR 178; *LSG Sky Chefs New Zealand Ltd v Prasad* [2018] NZCA 256.

²⁶ Employment Relations Act 2000, s 142M.

²⁷ Ministry of Business, Innovation & Employment "Fair Pay Agreements" (20 December 2018).

Just as the vast majority of cases in the general jurisdiction are disposed of at the District Court stage (both criminal and civil), most cases in the employment jurisdiction are disposed of by the Employment Relations Authority. The Employment Court deals with proportionately fewer cases, which tend to be the high value cases, which are of public importance, and/or which may be intractable. By the time they reach the Court, cases have almost certainly been through mediation (with a specialist employment mediator) and a full Authority hearing.

Like the High Court, Court of Appeal and Supreme Court, the judgments of the Employment Court are invariably reserved. This reflects the fact that the Employment Court's judgments need to be fully considered because of their potential impact. Importantly, the Employment Court is, for most people, the Court of last resort for their employment disputes, a point reinforced by the limited rights of appeal against judgments of the Court and the restrictions on the way in which the Court of Appeal may interfere with a judgment.

As already mentioned, judgments delivered by the Employment Court tend to be watched closely by employer, employee and union groups, as well as the public (including academics). That is because they state the law; they are binding on the Employment Relations Authority and they are given significant weight by specialist employment mediators overseeing the settlement of thousands of employment disputes per annum. The important precedential impact of judgments of the Court is reflected in the following statistics of resolved cases in one 12-month period:²⁸

- Mediation 11,395 cases resolved.
- Employment Relations Authority 809 cases resolved.
- Employment Court 179 cases resolved.

The Court thus shoulders a particularly heavy responsibility in the administration of justice to a large section of the community – broadly 500,000 employers and 2,500,000 employees.²⁹

²⁸ These figures are taken from one calendar year (2016). The mediation figure is comprised of 3,403 settled mediations and 7,992 private settlements signed off by a mediator.

²⁹ According to Statistics NZ, there are 534,930 enterprises in New Zealand. Statistics New Zealand “New Zealand business demography statistics; At February 2018” (26 October 2018) <www.stats.govt.nz/information-releases/new-zealand-business-demography-statistics-at-february-2018>.

There is a connection between the work of the Employment Court and that of the High Court – it is not infrequent for parallel claims (particularly in restraint of trade cases and other significant commercial litigation) to be brought in both the Employment Court and the High Court either in tandem or sequentially. The general practice is for one Court to defer to the other, in the sense of staying proceedings in its forum pending determination in the other. Sometimes the High Court will grant a stay – sometimes the Employment Court will. Much depends on the balance of convenience.

The following comparative table illustrates the cross-jurisdictional point:

	Appeal to?	Limit on \$\$ claims?	Rules applying	Authoritative statements of law	Steps in possible appeal
High Court	Court of Appeal	No limit	High Court Rules	Yes - except for employment law	Two
Employment Court	Court of Appeal	No limit	High Court Rules ³⁰	Yes - only employment law	Two (but only with leave and the appellate Courts must have regard to the specialist knowledge of the Employment Court Judges; no ability to appeal against Employment Court's contractual interpretation)
District Court	High Court	\$350,000	District Court Rules	No	Three

³⁰ Employment Court Regulations 2000, reg 6(2)(a)(ii).

Employment Court
Purely judicial - no lay members (from 1987)
High value cases (eg equal pay; sleepovers)
Must have regard to inherent imbalance of power employer/employee; role in maintaining industrial stability
Can make declarations
No financial limit
Frequent intervenors (eg Business New Zealand; the Council of Trade Unions, the Attorney-General; Ministers of the Crown, the Human Rights Commission); multiple parties sitting in behind the named litigant (eg Christine Bartlett the named plaintiff on behalf of thousands of rest home workers); class actions involving 1000s of named plaintiffs (for example <i>Ranchhod</i> , a claim which involved 3,500 claimants) ³¹
Mediation essentially compulsory in employment matters; Court obliged to consider directing further mediation; is invited to, and does, conduct numerous Judicial Settlement Conferences, many of which run for an extended period of time and involve multiple conferences, counsel and attendees
Candidates for appointment to the Court require highly specialised knowledge and skills (Court of Appeal must have regard to specialised knowledge of the Court; ³² Court of Appeal cannot interfere with Employment Court's interpretation of contracts); ³³ opportunity given to business and union groups to make their views known on the proposed appointee prior to appointment
Court of Appeal has limited powers of judicial review over Employment Court; High Court has no power of judicial review over Employment Court ³⁴

For completeness, reference can be made (and not infrequently is made in discussions about the placement of the Court in the court structure) to a 2004 Law Commission report.³⁵ The report made a number of statements about the place of the Court and set out a number of

³¹ *Ranchhod v Auckland Healthcare Services Ltd* [2001] ERNZ 771 (EmpC).

³² Employment Relations Act 2000, s 216.

³³ Section 214(1).

³⁴ Employment Relations Act 2000, ss 193 and 213.

³⁵ Law Commission *Delivering Justice for All; A Vision for New Zealand Courts and Tribunals* (NZLC R85, 2004).

recommendations for change. One of the key points that tends to be overlooked is that none of the Commission's recommendations in relation to the Employment Court were adopted.

Before referring in any more detail to the 2004 report, it is helpful to consider the report of the Royal Commission on the Courts 1978.³⁶ Though this report deals primarily with the main divisions in the hierarchy of courts – Court of Appeal, (then) Supreme Court and inferior courts, it is informative for two reasons. The first is that in describing the history of “Inferior Courts”, industrial matters are not mentioned at all, although the historical overview describes, in the early days of colonisation, “an almost bewildering series of inferior courts of civil and criminal jurisdiction”,³⁷ civil claims being to do with “recovery of small debts”.³⁸ Then, when describing “the Courts Today”, the Report sets out each area of law, noting which aspects are dealt with in Magistrates' Courts and which at the Supreme Court. Every category of then existing law is surveyed in terms of which aspects go to the Magistrates' Courts, and which to the Supreme Court. Only “industrial law” does not follow this pattern. Its description is:³⁹

(h) *Industrial Law* Industrial law is contained in a number of Acts of Parliament, the chief of which is the Industrial Relations Act 1973. The Industrial Relations Amendment Act 1977 changed the Industrial Court into the Arbitration Court and abolished the Industrial Commission. Disputes arising in this field are now determined by the Arbitration Court. This branch of the law is concerned with conditions of employment relations between employer and employee and the legal position of trade unions and employers' unions.

This affirms the separate status of employment law throughout the history of the development of the Courts, standing independently of both the Supreme (later High) Court and “inferior courts”. The basic point is that neither the Employment Court nor its predecessors have ever been linked historically to “inferior courts”.

Part 5.5 of the Law Commission Report 2004 deals with the Employment Court. Some submissions to the Law Commission recommended the disestablishment of the Employment Court as a specialist court.⁴⁰ The Law Commission rejected this and recommended it stay a

³⁶ Hon Mr Justice Beattie (Chair) *Report of Royal Commission on the Courts 1978* (presented to the House of Representatives, 10 August 1978).

³⁷ At 5.

³⁸ At 6.

³⁹ At 20.

⁴⁰ Law Commission, above n 36, at [274]-[275].

specialist court, but within the primary court structure. The Law Commission acknowledged that “at present, the Employment Court sits near the level of the High Court.”⁴¹

Along with its recommendation that the Court should become a primary court, the Law Commission recommended that a right of appeal should go to the High Court on matters of fact and law and that the High Court should also deal with applications for judicial review of the Employment Court,⁴² although it did not say why this was so. As has been noted, the recommendations of the Law Commission were not accepted. The Government of the day appears to have accepted that the Employment Court occupied a special position in the Court structure and decided to leave it where it was; no legislative steps were taken by Parliament to change the place of the Court, and none has been taken since. What can be taken from this Report, and by the decision not to adopt its recommendation, is that the Law Commission’s conclusion that “at present, the Employment Court sits near the level of the High Court”⁴³ remains equally valid today as it was in 2004.

The Court’s equivalent body in comparable overseas jurisdictions is revealing and reflects both the importance of the work labour courts are perceived to do and the separate space in which they tend to sit within the court structure. In the United Kingdom the equivalent is the Employment Appeals Tribunal, which is legislatively referred to as a “superior court of record”.⁴⁴ There are two classes of members: nominated members (from circuit, High Court and Court of Appeal Judges as well as at least one Judge from the Court of Session); and appointed lay members with specialised employment law knowledge.⁴⁵ Appeals from the EAT go to the Court of Appeal or the Scottish Court of Session.⁴⁶ The Australian Fair Work Commission is more or less equivalent to the New Zealand Employment Relations Authority (which sits below the Employment Court). Appeals from the Fair Work Commission are heard by a full bench of the Fair Work Commission.⁴⁷ Appeals on points of law go to the Federal

⁴¹ At [285].

⁴² At [294].

⁴³ At [285]. This is affirmed in the diagram of the Courts’ structure on the website of “Courts of New Zealand”: <www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system/diagram>.

⁴⁴ Employment Tribunals Act 1996, s 20.

⁴⁵ Section 22(1).

⁴⁶ Section 37.

⁴⁷ Fair Work Act 2009, s 613(1).

Court.⁴⁸ This puts the Employment Court New Zealand on something of a par with, but in a specialised way, the Federal Court.

All of this reinforces the point that it is necessary to appreciate the provenance of the Court and its development over time to understand why it continues to hold a special (elevated but separate) place in the court structure to this day. And while, over time, various views have been expressed about where the Employment Court *should* sit (depending on individual perspective) it is important to understand where it *does* actually sit, as a matter of Parliamentary will. Professor Roth has described the Court in the following way:

[t]he Employment Court has always been the senior court within its specialist jurisdiction.

The position can be summarised as follows:

- Throughout New Zealand's legal history, the various courts dealing with employment/industrial matters have stood outside the general hierarchy of courts. They have had close ties to the High Court (a Judge of the High Court being appointed to the Arbitration Court for instance), and the need to deal (in both Courts) with ongoing jurisdictional boundary issues.
- Employment law is not within the jurisdiction of the High Court; it is the Employment Court which makes authoritative statements of law in the field of employment. In this respect, it is the equivalent of the High Court in the employment sphere.
- Appeals from the Employment Court are to the Court of Appeal, and the Employment Court is directed (by legislation) to turn to the High Court Rules where its own regulations do not provide a steer. The High Court has no appellate role in relation to judgments of the Employment Court.
- The Employment Court may hear and determine applications for judicial review; the Court of Appeal hears and determines applications for judicial review against decisions of the Employment Court. The High Court has no role in such matters.

⁴⁸ Section 608.

- Even where the Court of Appeal hears an application for judicial review against the Employment Court it is limited to only three categories of decision (see ss 193, 213(2) of the Employment Relations Act).
- No steps were taken following the Law Commission's 2004 Report to realign the Employment Court, and any such steps would likely raise constitutional issues which would need to be carefully worked through.

In other words, the Employment Court, by design, by statute and by history, sits – in 2019 – alongside the High Court.