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# Employees' IP and the Employment Relationship – Incentives to Innovate

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Labour  
Relations  
Law



# Contexts

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- The importance of innovation:
  - “Hard” IP
  - “Know-how”
- Labour market changes
- Shifts in regulation theory and policy
- Labour law as a part of the regulatory architecture to promote innovation

# Labour law basics

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- Contractual duties
  - Implied terms: fidelity, good faith, confidentiality
  - Express terms
- Equitable duty of confidence
- Confidential information (intellectual capital)

# IP law basics

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- Statutory provisions for copyright & designs
- Common law presumption for patents
- “Know-how” and restraint clauses
  
- Fundamental nature of “course of employment” test

# The upshot

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- Contract (of employment) is trumps
- Areas of uncertainty:
  - Employee/independent contractor
  - ‘the course of employment’
  - ‘confidential information’ and ‘trade secrets’
- What incentives are set?

# Frameworks for allocating benefits of innovation

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Two frameworks in current literature:

- Economic
- “Fairness”

Too academic?

- Practice-based alternative

# Economic framework

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Employers should get benefits as:

- Incentive to invest in R & D
- Greater capacity to exploit innovation
- Employers take the “risk”

Free markets encourage innovation *and* good employers

# Fairness and cooperation

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It may be “fair” to allocate benefits to workers

- Law should enable credible employer commitments to fair treatment
- Cooperation fosters innovation
- “Psychological” contract
- Restricted use of post-employment restraints

# Limitations of approaches

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- Broad
- Focused on one side
- Limited conception of parties
- Limited conception of benefits

# Practice-based approach

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- Focused on employment relationship
- Acknowledges multiple motivations
- Nuanced understanding of “control”
- Acknowledges industry/firm differences
- Requires empirical investigation and practical insight