

Sechiras Po'alim: Halachos of Employment - Part II

Rav Eliezer Cohen, Dayan Bais HaVaad, Rosh Kollel of Kollel Choshen Mishpat in Cleveland & Lakewood

WHEN THE EMPLOYER IS LIABLE

In the first *shiur* of this series, we mentioned that if an employer reneges on a commitment to a worker causing him to miss out on another job he could have taken, he is obligated to pay him.

The source for this *halacha* is from the *sugya* in *Bava Metziah* 76b. As we mentioned, the *Mishnah* states that if an employer reaches an agreement with a worker to do a certain job, and either side backs out of the agreement, the other side may have "*ta'arumos*", grievances, but they have no monetary complaint that can be litigated in *Bais din*. The *Gemara* states that this is only true if the employees had yet to go to the worksite; however, in a case where donkey drivers went to the agreed upon place and saw that the wheat they were hired to transport was not there, or if workers went to a field they were hired to irrigate and saw that it had already been irrigated, [and the employer should have foreseen this possibility], they must be paid for the entire job. *Tosafos* explain that presumably they lost out on other opportunities in the interim, and that is why they are entitled to payment.

Since they don't actually have to do any labor, the amount they are to be paid is like the salary of a "*po'el batul*". This basically means that you calculate how much of a pay cut the employee would be willing to take to be able to sit idly, rather than do their work. That amount is deducted from their salary, and the employer must pay them the difference.

There are two main explanations in the *Rishonim*

regarding the reason the employer is obligated to pay for the loss of potential wages.

WHY THE EMPLOYER IS LIABLE

1. Mazik

The first explanation is discerned from *Tosafos* in the name of the *R"i*. The *R"i* states that we rule like Rav Meir, who says that one who damages his friend through "*garmi*" is obligated to pay. Based on this ruling, he asks why an employer is not obligated to pay a worker every time he terminates before the beginning of a job because of the concept of *garmi*?

To clarify: *Garmi* is a form of damage that is not completely direct, but is very close to it. A classic example of *garmi* would be if someone burns an IOU that a lender was holding. Although the one who burnt the loan document did not physically damage the lender in any way, he did do an action that caused him immediate damage, as he can no longer collect the money he is owed. In such a case where one created harm in a manner that is very close to direct damage, Rav Meir rules that the damager is obligated to pay for the loss he caused.

This is in contrast to a case of "*grama*", which is a more indirect form of damage. In cases of *grama*, even Rav Meir would agree that the damager cannot be forced to pay and is only obligated to pay in "*dinei shomayim*", by Heavenly judgment.

The *R"i* is positing that reneging on a commitment to a worker, and thereby causing him to lose his job, is akin

to *garmi*. Since we rule like Rav Meir, the employer should be obligated to pay for this reason.

Tosafos answer that this actually is the intent of the *Gemara*. When it states that an employer must pay the worker if he goes to the worksite and finds no work to do, it actually means that the worker gave up his opportunity to find alternate employment. He could have found another job that day, but he spent his time traveling to the worksite, and after he saw that he had nothing to do there, it was already too late to find another job for the day. Thus, the employer caused him a *garmi*-type loss, and that is why he is obligated to pay him.

According to *Tosafos*, the *Gemara* doesn't mean that the worker necessarily must go to the worksite in order for the employer to be obligated to pay him; rather, if the employer caused him to lose out on other opportunities in any way, he is considered to have damaged him, and he must compensate him for this damage.

We see that *Tosafos* learns that the employer's liability stems from the laws of "*nezikin*", damages. He is considered a *mazik*, damager, which obligates him to compensate the damaged party.

2. *Arvus* (Guarantor)

The second opinion found in the *Rishonim* is that the employer is obligated to pay because of a halachic rule known as "*arvus*", accepting to be a guarantor.

The *Ritvah* explains that when one accepts to be an *areiv*, a cosigner on a loan, he is obligated to pay the lender if the borrower cannot pay his debt. The reason he must pay is because he derives a feeling of satisfaction from the fact that he was trusted to be a guarantor on the loan, and in return he obligates himself to pay if the borrower cannot fulfill his obligation to the lender.

Likewise, the *Ritvah* says, the employer's obligation to pay his worker stems from the same fundamental concept. When an agreement is reached between the two sides, they both derive satisfaction from being trusted to fulfill the agreement; therefore, the employer obligates himself to keep his word and to pay the worker even if he reneges on the deal in exchange for this trust.

We see that the *Ritvah* does not learn like *Tosafos* that the obligation of the employer is rooted in the laws of *nezikim*; rather, it is connected to the law of *arvus*.

3. *Kinyan*

The *Ramban* explains the *Gemara* differently than *Tosafos*. He agrees with *Tosafos* that the employer would be obligated to pay because of the law of *garmi* if he causes the worker a loss by making him miss out on other employment opportunities, but he says that this is not the meaning of the *Gemara*.

The *Ramban* explains that the *Gemara* is speaking of a case where the worker suffers no loss. Rather, the *Gemara* is saying that if the worker travels to the worksite, he must be compensated even if he incurred no lost opportunities.

The explanation for this is that there is a rule that when an agreement between two parties is finalized with a *kinyan*, act of acquisition, the employer is not allowed to back out. If the employer would renege after a *kinyan* is made, he would be obligated to pay the workers for the job. Starting to work on a job is considered a level of *kinyan*; therefore, the employer would be forbidden to terminate the workers once they begin to work. The *Gemara* is explaining that traveling to a worksite is akin to starting work on the job. Thus, if the workers go to the worksite, the employer is not allowed to cancel on them. If he does, he is obligated to pay them for the full job, even if they suffered no loss as a result of being terminated. (The *Ramban* can be understood as following the rationale of the *Ritva*, but taking it to the next level. Alternatively, the *Sema* & *Nesivos* seem to indicate a connection to *Garmi*, albeit merely an adaptation of the concept in the form of a *Gezeirah*, since no loss was incurred according to the *Ramban*. See below as well.)

The *Shulchan Aruch* quotes the *Ramban* and says that the workers must be paid in such a case even if they incurred no monetary loss. This indicates that he is of the opinion that the employer will have an obligation to pay even when there are no damages.

The *Ketzos Hachoshen* presents a problem with *Tosafos'* approach. He notes that a *mazik* is only responsible to pay for damages, not for the loss of a potential profit. In the case of the employer, he didn't actually cause a damage to the workers; rather, he only caused them to lose potential opportunities. The *Ketzos* says that this case, therefore, could not fall under the category of *garmi*. Instead, he offers an opinion that the employer's obligation is a combination of *garmi* and "*sheves*", compensating

someone for time he caused them to lose, which is one of the forms of compensation a person must pay if he injures someone.

The *Nesivos Hamishpat* defends *Tosafos* that although the law of *garmi* usually does not apply when there is no actual damage, the *chachomim* issued a specific decree in this instance and enacted that one who hires workers must pay them if he causes them to lose a potential profit, even if they suffered no damage.

WHEN THE WORKERS CAUSE DAMAGE BY BACKING OUT:

If the worker chooses to renege on the agreement and causes a loss to the employer – for example, he is working on a time-sensitive project and by backing out he throws off the entire operation and causes monetary loss - there is a question regarding whether and how much he would be obligated to pay.

The *Rama* rules that in this case the worker will be labeled a *mazik*, and he must compensate the employer for the losses he caused. The *Chazon Ish* disagrees with this *Rama*, proving from various sources that he would only have to pay in the event the employer hired replacement workers at higher cost, and even then he'd only pay the cost of the workers and not for any damages.

THE SALARY OF A PO'EL BATUL:

How is the salary of a *po'el batul* calculated on a practical level? The *Taz* rules that the worker should be paid half of their salary for the full job. Other *Poskim* question this ruling and lean towards saying that the payment of a *po'el batul* is only a slight decrease in salary.

Some contemporary *Poskim* differentiate between a manual laborer, whose job involves a lot of physical work, and an office worker. For a manual laborer, there is a big difference between doing his job and sitting idly at home; therefore, he may be willing to take a 50% pay cut to not have to do his labor. An office worker, such as a secretary, does not have to perform strenuous, physical labor. Of course, she has to do work, but there is not as much of a difference for her between working in an office and sitting at home.

IF THE EMPLOYER FINDS THE WORKER ANOTHER JOB:

As we have stated, the *halacha* is that an employee may not terminate an employee in the middle of a job, and if he does, he must pay his salary for the entire job. The exception would be if the employee finds another job, in which case the employer would be off the hook. While the worker may still have “*ta'aramus*”, since he does have a new job which he is being paid for, he cannot demand payment from his old employer as well.

Finding a new job means that he procured for him another job that is similar in nature. If the new job pays less, the employer would be obligated to fill in the difference in salary.

The *Nesivos Hamishpat* rules that this *halacha* does not apply to a *kablan* [lit. a contractor] who usually takes all jobs that come his way, and may accept numerous jobs at one time. For example, a plumber may be contracted by multiple people at any given time to do work in their houses, and he may decide to take all the jobs. Similarly, a tailor may have multiple people bring him suits to alter at any given time, and he will accept to do all the jobs. As the *Nesivos* explains, an hourly worker only has one employer at a time; therefore, an employer will be exempt from paying if he finds a new job. A plumber or tailor, however, usually has multiple jobs at once; therefore, the fact that he has another tailoring job to do will not exempt someone who backs out on him from paying, as he would have had more than one job in any case.

It is obvious that if one brings the tailor a customer that he otherwise would never have gotten, he would not have to pay for his own work. If someone would find a new customer for a tailor who needs alterations done on a suit, and who had no previous intentions of using this tailor, he would be exempt from paying for the work he no longer wants, since he brought the tailor a customer he would never have had if not for him.

MAY A PO'EL QUIT IN THE MIDDLE OF A JOB:

Chazal gave a *po'el*, an hourly worker, the right to back out in the middle of a job, provided that he does not

cause a loss to the employer by doing so. Rav Aharon Kotler zt"l rules that if the *po'el* will cause a loss to the employer by backing out, he is not permitted to quit in the middle of his work. This is because he is not permitted to damage the employer, and by causing him a loss he is considered a damager as per the law of *garmi*. Rav Shlomo Zalman Auerbach zt"l disagrees and says the *po'el* always has a right to quit, even if by doing so he causes the employer a loss, just that he has to suffer the monetary consequences mentioned in *halacha*.

What if no loss will be incurred by the worker leaving in the middle of the job, but the employer will have to hire new workers at a higher salary?

The rule that a "*po'el*", who is paid by the hour, has a right to quit at any time is learned from the verse that states that we are only slaves to Hashem, and not to any man. If the hourly worker would be forced to continue working at the whim of his employer, whether he wants to or not, he would be akin to a slave; therefore, he is permitted to leave the job whenever he chooses to do so, and he would not be liable to compensate the employer for the higher salary he needs to pay his new workers.

It is interesting to note that even in common law an hourly worker is allowed to quit at any time because of a concept called "involuntary servitude". This concept is clearly taken straight out of the *Gemara*!

However, a "*kablan*", a worker who is paid for a completed job, does not have this right. Since he is allowed to make his own hours and work on his own schedule, he is not comparable to a slave; therefore, if he commits to completing a job, he is not permitted to back out in the middle without consequences. If the employer now has to pay his new workers a higher rate, the *kablan* would only be paid the remainder of the salary after the new workers got paid.

As mentioned, a *po'el* may not just quit whenever he wants if it may cause the employer a loss. Additionally, according to some opinions a worker does not have an allowance to back out in order to receive higher wages from a different employer.

A case discussed in the *Poskim* revolves around an employee who wishes to leave a position of importance in a company to accept a better paying job. An example of this would be if a company employs an office manager who is familiar with all

the ins and outs of the business and carries much of the responsibility of ensuring everything runs smoothly, and she is offered a larger salary by a rival company. Since her departure from the company is for the purpose of just getting higher wages and also it would necessitate hiring a replacement and training her in, which would cause serious losses to the business, she may not be allowed to back out for both of the above reasons.

It goes without saying that if she is hired "at will," then it was agreed that she can back out whenever she wishes if there will be no damage to the company. Additionally, if there was a contract for a given time, then she may take another job at the termination of contract. Furthermore, even when no contract exists, it is understood that she isn't locked into the job forever. A halachic authority should be consulted in such a situation.

Another halachic discussion pertains to workers at facilities that have a "busy season". In some industries, it is understood that there are certain times of year when business is slow, and certain times when business is booming. A worker's salary is calculated in a way that he makes the same amount per hour in the slow times and busy times, as it is understood that even though he does not work much during some months, he will make up for that during the months he has to work hard. It may, therefore, be forbidden to take the salary during the slow months and then quit before the busy months.

Even when one is permitted to quit a job in the middle, it may not be the proper thing to do. The *Chasam Sofer* stresses that righteous people do not leave a job in the middle unless they meet up with unforeseen circumstances that compel them to do so.

SUMMARY:

If an employer fires a worker and thereby causes him to lose other job opportunities, he is obligated to compensate him by paying him like a "*po'el batul*" for the extent of the contract.

There is a dispute amongst the *Rishonim* whether this obligation is connected to the laws of *mazik* or the laws of *arvus*.

If a *kinyan* took place or the work began, the employer may not renege on the deal. If he does, he

is obligated to pay the workers for the entire extent of the job (like a *poel batul*). Traveling to the worksite may constitute a *kinyan*.

If an employer finds his employee a new job, or if there are other jobs readily available, he is exempt from paying him. If the employee could have taken numerous jobs simultaneously, finding him a new job will not exempt the employer from paying him. If the employer finds him a job he would never have found on his own, even such an employee would no longer have to be paid.

An hourly worker may leave a job in the middle without penalty, but the employer can have *ta'arumos* against him. If by leaving he causes the employer a

loss, he will have to suffer monetary penalties and pay for the cost of the more expensive replacement worker and there is a *machlokes* whether he is allowed to quit. The same applies to a contractor.

If there is no loss, an hourly worker receives his salary for work performed even if he quits, as opposed to a *Kablan*, who is penalized for quitting and does not receive the full amount for work performed if the monies are needed to supplement the new workers higher salary.

In all cases—even without causing loss—it is improper for any employee, even a *po'el*, to renege on a commitment and leave a job in the middle.



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