

Dissolution & Severance

PART 4

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A TRANSCRIPTION OF THE YORUCHA CURRICULUM WEEKLY SHIUR VIDEO

IS AN EMPLOYEE ENTITLED TO SEVERANCE PAY?

According to the letter of halacha, an employer has no obligation to pay severance to an employee who is terminated or leaves a job unless this was explicitly agreed upon beforehand. If there is nothing in the employee's contract that obligates the employer to pay severance, there is no clear halacha that forces him to do so.

Having said this, there are three strong arguments for a halachic concept of severance pay:

1. A modern application of the idea of “*hanakah*”, which requires a master to present gifts to a slave when he is set free.
2. A general obligation to go “*lifnim mishuras hadin*”, above and beyond the letter of the law.
3. *Minhag hamakom*. The common local custom which is binding on all residents of the locale.

HANAKAH:

The verse in Parshas Re'eh states that when a Jewish slave is set free at the end of seven years of labor, his master should not send him away emptyhanded; rather, he should present him with gifts. This concept is known as “*hanakah*”. The Chinuch says that the rationale behind this mitzvah is obvious. This slave worked hard for his master for years and is entitled to some form of compensation. It is simple good *middos* to be kind to him and present him with some compensation as he leaves.

The Chinuch concludes that this concept can be taken further and applied to other workers. Although the actual verse is only speaking about slaves, and slavery does not exist in modern times, one should infer from the principle of the matter that if a worker is hired to work for a period of time, and he does his job faithfully, he should be given some form of *hanakah*. While the Chinuch does not say that this is a binding obligation, he stresses that it is the proper and correct thing to do.

The Minchas Chinuch says that it seems that there is a *machlokes* Rishonim if the concept of *hanakah* applies to all slaves. The Rambam says that it only applies to a slave who was involuntarily sold into slavery by *bais din*. If he voluntarily sells himself as a slave, he is not entitled to

hanakah. Tosafos disagree and say that even a person who sold himself into slavery receives *hanakah*. Because today's employees all work voluntarily, the Minchas Chinuch suggests that by applying the concept of *hanakah* to modern workers, the Chinuch seems to be ruling like Tosafos. However, he subsequently concludes by noting that it is unusual for the Chinuch to rule against the Rambam. The Tzitz Eliezer understands that the Minchas Chinuch was in fact retracting and stating that the concept of *hanakah* can be applied to contemporary workers even according to the Rambam. According to this, the concept that a worker should be taken care of after he leaves a job would be according to all opinions.

Many Acharonim invoke this Chinuch as a reason to compel employers to pay severance. The Even Shoham speaks about a case of a man who worked for a Chevrah Bikur Cholim and was injured on the job to the extent that he could no longer work. He ruled that although according to the letter of the law the Chevrah Bikur Cholim has no obligation to pay him any severance, if they want to do the correct and proper thing, they will provide him with a form of *hanakah*, as the Chinuch states.

LIFNIM MISHURAS HADIN:

The Machazeh Avrohom discusses a case where a *shochet* died and left over a widow with no source of income. The widow wanted some form of a pension from the community and the case was brought to the Machazeh Avrohom. He invoked the Chinuch's concept of *hanakah* as one reason that she should receive compensation and also said that the community should pay her *lifnim mishuras hadin*. While there is a *machlokes* if a *bais din* can compel a party to go above the letter of the law, he notes that an “*odm choshuv*”, distinguished person, is held to a higher standard and can be obligated to go *lifnim mishuras hadin*. This is seen from a Gemara in Bava Metziah that tells the story of an Amora who hired workers to transport barrels of wine for him. The workers broke the barrels during transport and the Amora asked a *dayan* if he could demand payment from them. The *dayan* told him that not only should he not demand payment, he also should pay the workers their wages. When he asked if that was the halacha, the *dayan* said that *for him* it is the halacha, as he should go *lifnim mishuras hadin*. Many Poskim understand that this Gemara is saying that a distinguished

person can be obligated to conduct himself according to the standards of *lifnim mishuras hadin*. The Machazeh Avrohom applies this concept to a community, as a *kehillah* has the status of an *odom choshuv*.

Similarly, the Pe'as Tzedakah relates that Rav Abba Grossbard presided over a case of a chazzan whose services were terminated. He ruled that the community should pay him a pension because a *kehillah* has the status of an *odom choshuv*.

Shu"t B'tzeil Hachochmah also says that although providing a pension is not an explicit obligation according to halacha, one should look at the details of each specific case and determine if the employer should be compelled to pay severance *lifnim mishuras hadin*. The Pischei Teshuva writes similarly in the name of an earlier source, the Teshuvos Mayim Chaim, and rules that a *kehillah* should go *lifnim mishuras hadin*.

The Minchas Yitzchok writes that the Chinuch's concept of *hanakah* only applies if a worker is fired. If he quits of his own accord, he is not comparable to a slave who is compelled to leave at the end of seven years; therefore, he is not entitled to *hanakah*. However, he adds that the consideration of compensating him *lifnim mishuras hadin* does apply even if a worker quits. If he worked faithfully for a period of years, he deserves to be compensated and the concept of *lifnim mishuras hadin* may be applicable.

MINHAG HAMAKOM:

The Minchas Yitzchok adds that irrespective of the previous reasons why a worker should be paid severance, the common custom in Eretz Yisroel is to provide some form of severance. The Tzitz Eliezer also writes that everyone knows that this is the accepted *minhag* and therefore it must be followed. The Minchas Yitzchok notes that this is not necessarily the custom everywhere and it would depend on the place. If there is no clear *minhag*, one would have to fall back on the concepts of *hanakah* or *lifnim mishuras hadin* to compel the payment of severance.

Even in places where there is a common custom to pay severance, this compensation is usually only granted to employees and not to independent contractors. Sefer Mishpat Hapoalim says that even the concept of paying *lifnim mishuras hadin* does not apply to those defined as contractors.

It is not 100% clear how to differentiate between an employee and a contractor according to halacha. Some say that workers paid by the hour are defined as employees,

while those paid to complete a job are defined as contractors. Still, there was a *din Torah* in Eretz Yisroel involving a man who owned a bus and was hired to transport children to school. When the school made other arrangements and no longer needed his services, he argued that he is entitled to a pension. The school counterargued that he is an independent contractor and, therefore, they have no obligation to him. He responded that he was beholden to the school during certain hours of the day – the times of drop-off and pick-up – and, therefore, was their employee. The case revolved around the question of how exactly to define the difference between an employee and a contractor.

CHODESH L'SHANA:

While there is no *minhag hamakom* in the United States regarding severance pay in general, there does seem to be a custom in Jewish circles to provide those who work in "*kli kodesh*", i.e., *rabbeim*, *Rabbanim*, etc., with "*chodesh l'shana*", a pension plan that totals one month worth of pay for each year of work. It is widely accepted that this custom stems from Rav Moshe Feinstein.

While the idea of *chodesh l'shana* is not found in Rav Moshe's writings, it is widely attributed to him. In a sefer published on this topic, several *teshuvos* are printed from Rav Moshe's son, Rav Dovid Feinstein, in which he affirms that his father held of this concept. In one *teshuva*, Rav Dovid seems to say that Rav Moshe applied *chodesh l'shana* not only to *kli kodesh* but also to any worker. In another *teshuva*, Rav Dovid seems to scale back the scope of the obligation to apply mainly to those who worked in *kli kodesh*.

Torah U'Mesorah has incorporated the obligation of *chodesh l'shana* into their Code of Practice, writing that it is accepted that all *rabbeim* who retire or are terminated – even if the school closes down – should receive this pension based on the salary they were receiving at the time their job ended. They base this practice on Rav Moshe's view and state that it is accepted in all school circles.

While it isn't clear if Rav Moshe was unilaterally making a *takanah* based on his authority as the leader of American Jewry, or he was simply attesting to a common *minhag*, or using some other halachic means; many *Rabbanim* say that because *chodesh l'shana* has now been accepted as the common practice in the United States, it now has the full status of a *minhag hamakom* – regardless of what Rav Moshe's original intent was – and is completely binding.

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