

*Tenure Rights of an Employee and Rights to Severance Pay upon Termination or Non-Renewal of a Labor Agreement—  
The Beth Din Experience as a Case Study*

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The purpose of this essay is to examine within the context of a Beth Din decision whether employment is regarded as an entitlement to retain one's position for life subject to dismissal for cause. Loss of one's position may be due either to being terminated by one's employer or by non-renewal of a labor contract. Furthermore, we will expose the reader to the various approaches in resolving cases regarding the awarding of severance pay upon the termination of employment or non-renewal of a contract. Severance is a monetary allowance paid by the employer to his employees, generally upon permanent termination of employment or non-renewal of a contract. These payments may be distributed either as a lump sum or as a series of periodic payments. The amount of remuneration is dependent upon the length of employment of the worker. This presentation is inspired by a reasoned opinion handed down by a Beth Din. This expanded version of the decision of the Beth Din begins with the plaintiff's claims and the defendant's response. Subsequently, there is a discussion of the halakhic issues emerging from the parties' respective claims and counterclaims followed by the decision rendered by the Beth Din panel. To preserve the confidentiality of the parties, names and some facts have been changed.

## The Decision Issued by the Beth Din:

### *Abraham Cohen v. Yeshiva Har Tzvi*

On July 1, 2009, the above parties signed an arbitration agreement empowering this panel to resolve this matter according to applicable portions of *Shulḥan Arukh* and *poskim*. Both parties submitted to this Beth Din their differences and disputes in reference to Abraham Cohen's employment at Yeshiva Har Tzvi. Having given said matters due consideration and having heard all parties testify as to the facts of said disputes and differences, do decide and agree as follows:

### **Facts:**

In the year 1995, Yeshiva Har Tzvi hired Rabbi Abraham Cohen as a third grade *rebbe* commencing with the school year of 1995–1996 and he continued in that capacity until the non-renewal of his contract at the end of the school year 2008–2009. Prior to his dismissal, Plaintiff stole funds from the Yeshiva. Within two months of his non-renewal, Rabbi Cohen summoned the Yeshiva to Beth Din. In September 2009, this panel was convened to hear the case and a *psak din* was issued in January 2010.

### **Plaintiff's Claims:**

Though Plaintiff admits that he stole Yeshiva funds, nonetheless, Plaintiff argues that the non-renewal of his contract is a violation of both halakhah and *minhag*, i.e., common practice. Pursuant to the rulings of Rabbis Feinstein, Auerbach and Weiss, Plaintiff claims that a teacher's contract for one year must be renewed and if the Yeshiva feels that there are grounds for non-renewal of the contract, the Yeshiva must allow a Beth Din to be the final arbiter regarding this matter. (Moreover, cases of dismissal that received rabbinical sanction are limited to employers who were acting in an individual capacity rather than as communal representatives.) Hence a Beth Din, rather than the Yeshiva, ought to be the arbiter regarding the non-renewal of his contract. Consequently, as *Rabbi Feinstein* notes

in *Iggerot Moshe*,<sup>1</sup> Plaintiff is entitled to receive his salary from the period of the non-renewal of his contract until the Beth Din's ruling that the termination was justified. Second, even if one would contend that the practice is not to customarily renew teachers' contracts, halakha would not validate this *minhag* (even though it relates to monetary affairs, i.e., *dinei mamonot*) since it is neither endorsed by a rabbinic authority nor based upon an ordinance approved by the leaders of the community. Moreover, whereas, the Yeshiva argues that a teacher can be requested to leave "at-will," according to Rabbi Feinstein, the halakha that one cannot fail to renew a labor contract or terminate without cause cannot be trumped by a *minhag* which provides otherwise.<sup>2</sup> Thirdly, appointment of a *melamed* is a sacred appointment (*minui shel kedushah*) and therefore, he cannot be dismissed except for "*peshiah*," i.e., negligence.

Finally, though Plaintiff admits that his employment agreement explicitly stipulates that Plaintiff is not entitled to any post-employment benefits including severance pay, nevertheless, he originally agreed to waive his benefits because he was financially comfortable. However, given that Plaintiff lost the majority of his assets in the 2008 market meltdown, he is now in dire need of these resources. Secondly, in the past the Yeshiva provided severance pay for six of its dismissed *rebbe*s, therefore a *minhag*, i.e., customary practice, has been established and thus the existence of this *minhag* ought to be grounds for awarding severance. In effect, Plaintiff is claiming that the prevalence of the *minhag* should trump the provisions of the employment agreement. Furthermore, Defendant should recognize his unstinting dedication to the Yeshiva and, therefore, provide him with severance benefits. His act of thievery unrelated to his educational contributions to the Yeshiva ought not to nullify his right to receive severance pay.

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<sup>1</sup> *Hosben Mishpat*, vol. 2, no. 34.

<sup>2</sup> *Arukh Hashulhan*, *Hosben Mishpat* 331:5; *Teshuvot Iggerot Moshe* 1:72, 75. In effect, Rabbi Feinstein construes this halakhah as an *issur* and given that *minhag* cannot nullify an *issur* (*Rosh Hashanah* 15b), therefore, an employee cannot be terminated without cause.

### Defendant's Response

Defendant argues that the Plaintiff was an “at-will employee” and as such was not contracted for life. Towards the end of every school year, the Plaintiff, similar to all other faculty members of the Yeshiva, received a contract for the forthcoming school year. In total, the Yeshiva and Plaintiff signed off on ten employment contracts. Consequently, at the end of any year Defendant had the right to decide whether to renew his contract for the upcoming year. Given that the facts indicated that the Plaintiff stole funds from the Yeshiva during the school year 2008–2009, the Defendant notified the Plaintiff in a timely fashion that the Yeshiva would decline to offer him a contract for the 2009–2010 school year. Finally, Defendant argues that given that Plaintiff only became aware after the Yeshiva's notification that in the past six *rebbe*s received severance packages, and given that Plaintiff only became aware of the *minhag* to award severance in certain situations after his dismissal, and given the circumstances surrounding his dismissal; therefore, Plaintiff should not be entitled to such benefits. Moreover, the employment agreement precludes the awarding of severance and as such the contract should override the *minhag* of the Yeshiva's instances of providing severance to others. Finally, Plaintiff's present economic situation should not impact upon the issue of whether he is entitled to a severance package.

### Halakhic Discussion:

The Beth Din must address two questions: Firstly, whether Plaintiff's employment is a tenured position, and whether termination or non-renewal of a contract requires prior Beth Din authorization. Secondly, whether Defendant is entitled to severance benefits?

Let's begin by addressing the question of tenure and the role of Beth Din in cases of employment termination or non-renewal of a contract. According to Rabbi Moshe Feinstein, a teacher, *similar to any employee*, retains his position for life subject only to removal for cause.<sup>3</sup> This ruling applies even where the yeshiva and teacher agreed to specify in their contract a fixed term of employment. In

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<sup>3</sup> *Teshuvot Iggerot Moshe, Hoshen Mishpat* 1:75–8; 2:34.

effect, a term contract is a vehicle to convey the notion that any employee is not to be equated with being “an indentured slave” rather than being a device empowering an employer to dismiss his worker at the expiration of the term.<sup>4</sup>

Rabbi Feinstein suggests that even if the contract provides that a teacher’s contract may not be renewed even in the absence of just cause, such a provision may be invalid due to the fact that such action would be contrary to the halakhic requirement that requesting a teacher to leave a yeshiva’s employ must be for cause.<sup>5</sup> Moreover, prior to dismissal of an employee, a Beth Din must determine that the ground for termination or non-renewal of a contract is for cause. Until such Beth Din determination, Rabbi Feinstein contends the employer is obligated to pay the worker his salary.

Notwithstanding the view of R. Moshe Feinstein who argues that *any employee* cannot be dismissed upon the expiration of a contract period prior to a Beth Din’s determination that the termination is justifiable,<sup>6</sup> the consensus of most decisors is to recognize a yeshiva’s right to refuse to offer a new contract without any requisite need for a Beth Din approval. No distinction is advanced either in the Talmud, restatements or most *teshuvot* that a community and/or group is precluded from renewing a contract without a Beth Din’s definitive ruling.<sup>7</sup> In fact *Rema* states:<sup>8</sup>

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<sup>4</sup> *Teshuvot Hatam Sofer, Orah Hayyim*, nos. 205–206.

<sup>5</sup> *Teshuvot Iggerot Moshe, Hoshen Mishpat* 1:77.

<sup>6</sup> Some authorities invoke the need for Beth Din determination prior to termination in limited circumstances such as an employee who is suspected of being a thief or a pedophile. See *Teshuvot Lehem Rav*, no. 4; *Teshuvot Teshurat Shai*, vol. 1, no. 603; *Teshuvot Hikekei Lev*, vol. 1, *Orah Hayyim*, no. 47; *Dinei Mamonot*, vol. 3, 34; *Teshuvot Divrei Malkiel*, vol. 3, nos. 152–153; *Pithei Teshuvah, Hoshen Mishpat* 232:5. Cf. others who argue that absent Beth Din determination the evidence must demonstrate that he is a thief prior to termination. See *Raavad* and *Rashba, Shitah Mekubetzet, Bava Kamma* 28a, *Meiri, Bava Kamma* 28a; *Teshuvot Shevut Ya’akov*, vol. 1, no. 174; *Erekh Shai, Hoshen Mishpat* 421; *Ohel Yitzhak, Hoshen Mishpat*, no. 53.

<sup>7</sup> See *Bava Metzia* 109a; *Mishneh Torah, Hilkhhot Sehirut* 10:7; *Raavad*, ad. locum.; *Tur, Yoreh De’ah* 245:17–18 and *Hoshen Mishpat* 306:8; *Shulhan Arukh, Hoshen Mishpat* 306:8, 333:2; *Rema, Hoshen Mishpat* 421:6; *Teshuvot*

If someone has a servant and you are suspicious that he will steal from you, you may dismiss him prior to the expiration date of his employment.

*A fortiori*, in our scenario, the Defendant was authorized to refuse to renew a contract with the Plaintiff who perpetrated a theft, without the prior approval of Beth Din.

In fact, there are actual cases of teacher dismissals by *communal* institutions without recourse to a Beth Din judgment which were rabbinically sanctioned.<sup>9</sup> In legitimating an employer's right to terminate a teacher for inappropriate behavior, R. Yaakov Emden invokes the rule of "*avid inish dina lenafshei*," i.e., taking the halakha into one's hands.<sup>10</sup> To prevent potential financial damage, under certain conditions, an individual is empowered with the authority of a Beth Din to judge his case for himself.<sup>11</sup> In the eyes of R. Emden, this empowerment equally extends to an employer's right to dismiss a teacher in cases of negligence. A similar conclusion is arrived at by the *Hazon Ish* concerning the right to demand that an employee leave his work upon the expiration of the contract.<sup>12</sup>

Moreover, the rulings of Rabbis Auerbach and Weiss<sup>13</sup> which were alluded to by the Plaintiff which mandate recourse to a Beth Din prior to termination, are limited to cases dealing with a teacher's right to participate in a strike and conflicts between a principal and teacher regarding differing educational philosophies, respectively. Hence, these rulings are inapplicable to our issue at bar of alleged malfeasance.

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*A'shair le-Shlomo*, no. 63; *Milei DeNezikin* (in the name of Rabbi Moshe Stern), 50–51, 133; *Teshuvot Divrei Malkiel*, vol. 3, no. 151; *Teshuvot Maharsham*, vol. 2, no. 132.

<sup>8</sup> *Rema, Hoshen Mishpat* 421:6

<sup>9</sup> *Teshuvot Torat Moshe*, no. 24; *Teshuvot Maharashdam, Yoreh De'ah* no. 141; *Teshuvot Ohel Yosef, Sehirut* no. 4; *Piskei Din Battei Din ha-Rabbaniyim* (hereafter: *PDR*) 14:101.

<sup>10</sup> *Teshuvot Mishnat Ya'avetz*, vol. 2, no. 38.

<sup>11</sup> For viewing the plaintiff as assuming the role of Beth Din, see *Dibrot Moshe, Bava Kamma* no. 18.

<sup>12</sup> *Hazon Ish, Bava Kamma* 23:2.

<sup>13</sup> *Teshuvot Minhat Shlomo*, vol. 1, no. 87; *Teshuvot Minhat Yitzhak*, vol. 4, no. 75:12.

Upon review of the evidence presented by the parties and applicable halakha, the Beth Din accepts the Defendant's position that there was term employment, memorialized in writing, governing the relationship of the involved parties. Halakhah recognizes the ability of parties to enter into contractual agreements including but not limited to labor contracts. At the expiration of the term of a contract, both parties have free rein whether to renew or not to renew.<sup>14</sup> As such, the Defendant was empowered to dismiss the Plaintiff without receiving initial approval from a Beth Din.

Furthermore, the issue whether employment generates tenure rights for the employee is governed by *ha-kol ke-minhag ha-medinah*, i.e., everything is in accordance with the custom of the city.<sup>15</sup> In other words, absent a provision of the contract to the contrary, if a particular community construes a labor contract as generating employee tenure rights, then the employee cannot be terminated. On the other hand, absent a provision of the contract to the contrary, if another community views him as an "at-will employee" then the employer can terminate him at-will or after the expiration date of the contract. As such, the customary practice of a particular community will determine whether an employee enjoys tenure or not. To have binding force, the *minhag* must be clear, widespread in the particular locale and have been followed at least three times.<sup>16</sup> Though there is a long-standing halakhic dispute whether a monetary custom practiced by the community on their own has any authority or does such a custom require endorsement by rabbinical authority or a vote approved by communal leaders, nevertheless,

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<sup>14</sup> *Piskei ha-Rosh*, *Bava Batra* 21a; *Teshuvot Rashbash*, no. 112; *Teshuvot Yaskil Avdi*, vol. 4, *Yoreh De'ah*, no. 18; *PDR* 3:91, 8:129, 143–144.

<sup>15</sup> *PDR* 18:94; *Pithei Hoshen*, *Sehirut* no. 10:11, n. 35. Pursuant to *Hazon Ish*, *Bava Kamma*, no. 23 if the prevailing practice is that employment is a tenured position, then one can only dismiss such an employee for cause. See *PDR* 3:91, 93. Whether a congregational rabbi who receives a contract with a fixed term is subject to dismissal without just cause after the expiration of the term is a question which is beyond the scope of this presentation. See this writer's forthcoming book, *Religious Authority: The Vision and the Reality* (2012).

<sup>16</sup> *Teshuvot ha-Rosh*, *kelal* 79:4; *Teshuvot ha-Rivash*, no. 475; *Teshuvot Terumat ha-Deshen*, no. 342; *Rema*, *Hoshen Mishpat* 331:1.

the classical restatements have either explicitly or implicitly ruled that a monetary custom has an independent status.<sup>17</sup> Hence, given that the common practice of the Defendant and the local yeshivot in the surrounding communities is to offer one-year renewable contracts to its teachers, *minbag* **unaccompanied by rabbinic or communal sanction** prevails for two reasons: Either due to the fact that this *minbag* is based upon the above referenced halakhic authorities which view Plaintiff as an employee at-will,<sup>18</sup> or pursuant to the normative position reflected in the above cited rulings of *Shulḥan Arukh* and *Rema* that impart an independent status to a monetary custom **even if the result will be to extract money from the muḥzakim** (the owners).<sup>19</sup> In effect, today, a *melamed* is appointed pursuant to the provisions of “*minbag ha-medinah*” similar to any employee rather than being viewed as a “*minui shel kedushah*” (a sacred appointment).<sup>20</sup>

Let us now address our last issue, whether Plaintiff is entitled to a severance package. As is the customary practice in *battei din* today, both parties to this hearing signed an arbitration agreement (*shtar borerut*) which empowers this panel to resolve the matter.<sup>21</sup> One of the terms of the agreement is that the Beth Din has the authority to resolve the matter according to halakhah (*din*) or through court-ordered settlement in accordance with halakhah (*pesharah krovah le-din*). Our response to the awarding of severance will be addressed on three functionally and conceptually different planes: the level of *din*, i.e., strict law, *pesharah krovah le-din*, i.e., court ordered settlement in accordance with halakhah, and *lifnim mi-shurat ha-din*, i.e., above and beyond the line of law which is a subcategory of *pesharah*.<sup>22</sup>

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<sup>17</sup> *Shulḥan Arukh*, *Hosben Mishpat* 176:10, 218:19, 229:2, 230:10, 232:6, 330:5, 331:12; *Teshuvot ha-Rema* nos. 19–20; *Rema*, *Shulḥan Arukh*, *Hosben Mishpat* 72:5.

<sup>18</sup> *Supra* text accompanying notes 1–10.

<sup>19</sup> *Supra* n. 17.

<sup>20</sup> *Pitḥei Hosben*, *Sehirut*, p. 260, no. 35.

<sup>21</sup> *Rema*, *Hosben Mishpat* 12:7; *Sma*, *Hosben Mishpat* 12:18.

<sup>22</sup> Ramban, *Perush al ha-Torah*, *Devarim* 6:18; *Teshuvot Divrei Malkiel*, vol. 2, no. 132; *Teshuvot Givat Pinḥas*, no. 68.



The right of an employee to receive compensation upon dismissal is neither mentioned in the Torah and Talmud nor in the overwhelming majority of post-Talmudic sources. Nevertheless, one legist argues that a terminated worker is analogous to an *eved ivri*, i.e., a Jew bereft of funds and in need of gainful employment who must work for six years.<sup>23</sup> Just as an *eved ivri* receives a parting, albeit gratuitous, gift, i.e., *ha'anakah*, from his employer upon the completion of six years,<sup>24</sup> similarly, a dismissed laborer should receive a severance package. As Rabbi Aharon of Barcelona notes:<sup>25</sup>

We shall show compassion to someone who has worked for us and give him from assets indicative of our kindness above and beyond his salary...

Following in the footsteps of Rabbi Aaron of Barcelona, numerous *poskim* endorse the view that the giving of severance is a halakhically-moral obligation rather than a halakhically-legal duty<sup>26</sup> and, as such, would be unenforceable by a Beth Din.<sup>27</sup> The grounds

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<sup>23</sup> *Tosafot*, *Kiddushin* 16a. Cf. *Mishneh Torah*, *Hilkhot Avadim* 3:12 who contends that there is no duty to give a gratuitous gift to an *eved ivri* who, bereft of funds, works six years for his employer. Consequently, certain authorities refuse to invoke the halakhah of *ha'anakah* as grounds for awarding severance. See *Teshuvot Yam ha-Gadol* no. 22.

<sup>24</sup> *Devarim* 15:12–14.

<sup>25</sup> *Sefer ha-Hinuch*, *Mitzvah* 450 [Chavel ed.]. Such a position has been endorsed by *Teshuvot Even ha-Shoham*, *Hoshen Mishpat* no. 120 and attributed to Rabbi Moshe Feinstein. See letter dated 15<sup>th</sup> of Adar 5763 from Rabbi Dovid Feinstein to Rabbi Friedman (a copy of the letter is on file with author).

<sup>26</sup> For the interplay between a halakhically-legal obligation and halakhically-moral obligation, see this writer's "The Theory of Efficient Breach: A Jewish Law Perspective," in A. Levine, ed. *Oxford Handbook on Judaism and Economics*, NY: Oxford University Press, 2010, 340, 344–348.

<sup>27</sup> *Shakh*, *Hoshen Mishpat* 86:3; *Sma*, ad. locum. 86:2; *Tumim*, *Hoshen Mishpat* 86:3. Cf. *Gidulei Terumah*, *Shaar* 51, 1: 5; *Mishneh le-Melech*, *Hilkhot Avadim* 3:14; *PDR* 3:287.

Our conclusion regarding non-enforceability of the duty is pursuant to the dictates of the *din* (halakhah). However, in this case, similar to many other cases, the signed arbitration agreement provides that this matter may be resolved by *pesharah krovah le-din* (court-ordered settlement in ac-

for this award are either understood as compensation for work beyond the call of duty or as a gift given out of an act of kindness.<sup>28</sup> Based upon this understanding that severance is a halakhically-moral duty, this panel would be unable to coerce the Defendant to pay severance to the Plaintiff.

Realizing that the institution of *ba'anakah* could not be relied upon to support the existence of a full-fledged halakhic-legal duty to compensate an employee upon his dismissal, Israeli rabbinical courts preferred to base this duty upon the existence of *minhag*. Whether an employee would be entitled to severance pay would depend on whether in his community, his profession, and/or in his place of employment severance was given.<sup>29</sup> As we explained earlier, for a custom to be binding upon the employer, it must be clear that the compensation awarded to the worker was severance and that it is common practice. Even though the Plaintiff only became aware of the Yeshiva's custom to award severance after the Yeshiva's notification of non-renewal of his contract, the halakhic power of the *minhag*, independent of the parties' knowledge of its existence, establishes an employer duty's to award compensation and an employee's right to receive it.<sup>30</sup>

However, in our scenario, what does halakhah say regarding parties who agree that severance will not be awarded upon termination or non-renewal of a contract? As we know, in monetary matters, parties are permitted to design their own business relationship provided that the arrangement complies with a proper form, e.g. *kinyan*, and is not a violation of any prohibitions such as theft or

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cordance with halakhah). As such, a Beth Din is empowered to mandate that individuals comply with their halakhic-moral obligations. See *Teshuvot Mahari Bruna* 241; Rabbi Zalman N. Goldberg, *Shivhei ha-Pesharah* section 5 (letter sent to Kollel Mishpetei Aretz, Ofrah, Israel). Nonetheless, in this situation, we refrained from invoking *pesharah krovah le-din*.

<sup>28</sup> *Beth ha-Behirah*, *Kiddushin* 15a; *Sefer ha-Hinuch*, supra n. 25; *Shakh* and *Sma*, supra n. 27.

<sup>29</sup> *PDR* 1:330, 331; 3:92–94, 272, 287; 4:127–129, 8:78–81. See also, *Teshuvot Tzitz Eliezer*, vol. 7, no. 48:10.

<sup>30</sup> *Dinei Mamonot*, vol. 2, p. 315; *Pithei Hoshen*, *Sehirut*, p. 149, n. 18. Cf. *Shakh*, *Hoshen Mishpat* 42:36.

the interdict against taking *ribbit*.<sup>31</sup> Consequently, if the agreement between the Yeshiva and teacher varies from the halakhic norms of severance pay, it would seem that the agreement will be valid and binding upon the parties. In other words, the parties' agreement which precludes the awarding of severance trumps the *minbag* which mandates the award.<sup>32</sup> In short, in our scenario, despite the fact that there is a widespread practice of giving severance both in the Yeshiva and among the surrounding schools, pursuant to the *din*, based on the private agreement between the parties, Plaintiff is not entitled to severance.

In terms of *pesharah krovah le-din*, one of the primary objectives of compromise is to promote *shalom*, i.e., peace, between litigious parties.<sup>33</sup> The need to foster compromise for the sake of peace equally applies in communal matters such as our case<sup>34</sup> and in particular regarding labor relations.<sup>35</sup> However, halakhah proscribes us from implementing compromise for purposes of promoting peace if there is no justification for a plaintiff's claim. Based upon *pesharah krovah le-din*, a Beth Din cannot mandate that the defendant's funds be transferred to the Plaintiff for purposes of fostering peace.<sup>36</sup> These assets belong to the defendant and therefore rightfully ought to remain in his possession.

In short, pursuant to the dictates of *din* and *pesharah krovah le-din*, Plaintiff is not entitled to severance pay.

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<sup>31</sup> *Kiddushin* 19b; *Beit Yosef, Tur Hoshen Mishpat* 305:4; *Rema, Hoshen Mishpat* 344:1.

<sup>32</sup> *Shulhan Arukh* and *Rema, Hoshen Mishpat* 331:1; *PDR* 8:78; *Hiddushei ha-Gaon Rabbi Akiva Eiger, Bava Metzia* 83a; Yisrael Yifrach, "A Labor Agreement in Variance with National Custom," (Hebrew), 3 *Shurat Hadin* 278 (5758). For dissenting views, see *Radach, Shitah Mekubetzet, Bava Kamma* 83a, *s.v. ha-sochair* and Avraham Sherman, "An Employee Who Waived His Rights," (Hebrew), 18 *Tehumin* 242 (5768).

<sup>33</sup> *Sanhedrin* 6b [R. Joshua ben Korcha's dictum]; *Teshuvot Shevut Ya'akov*, vol. 2, no. 145.

<sup>34</sup> *Teshuvot Meishiv Davar*, vol. 2, no. 10; *Teshuvot Ha'emek Davar*, vol. 3, no. 10.

<sup>35</sup> Yoezer Ariel, *Dinei Borerut*, p. 223.

<sup>36</sup> *Ibid.*, 170–171.

However, the particular circumstances of our case compel us to address a third dimension in the halakhic decision-making process, namely, *lifnim mi-shurat ha-din*, lit., beyond the limit of the law, the need to act in certain circumstances more generously than the *din* and *pesbarah*, mandate.<sup>37</sup> As R. Aharon Lichtenstein observes, this sphere of halakhic-decision making operates within the realm of “contextual morality.”<sup>38</sup> According to many decisors, a Beth Din can compel an individual to act more generously than the *din* requires.<sup>39</sup> This mandate applies even if the circumstances entail the defendant incurring a financial expense.<sup>40</sup>

This obligation upon a Beth Din to resolve a case based upon *lifnim mi-shurat ha-din* equally devolves upon a communal institution. Many years ago, there was an Argentinean Jewish butcher who owed a tremendous sum of money to a local Argentinean Jewish community. The local rabbi posed the following question to R. Yitzchak Weiss, a well-known contemporary decisor: Is his community, a populace of limited economic means, authorized to issue injunctive relief in the form of seizing some of the butcher’s machinery such as a refrigerator, electric meat carver and scales used on the job for purposes of satisfying the outstanding debt? Though the community was deemed impoverished, R. Weiss, nevertheless, relying upon *lifnim mi-shurat ha-din* invoked the well-established concept “*the community is not poor.*”<sup>41</sup> As

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<sup>37</sup> *Bava Metzia* 30b, 83a.

<sup>38</sup> Aharon Lichtenstein, “Does Jewish Tradition Recognize an Ethic Independent of Halakhah?” in *Modern Jewish Ethics: Theory & Practice*, Fox ed., Ohio State University Press, 1975, 62, 78.

<sup>39</sup> *Rema Hoshen Mishpat* 12:2; *Teshuvot Rema*, no. 22; *Pithei Teshuvah*, *Hoshen Mishpat* 12:6; *Bah*, *Tur Hoshen Mishpat* 12:4; *Shakh*, *Hoshen Mishpat* 259:3, *Taz* ad. loc; *Taz*, *Orah Hayyim* 343:2; *Teshuvot Shevut Ya’akov* vol. 1, no. 168; *Teshuvot Hatam Sofer*, *Yoreh De’ah*, no. 239.

<sup>40</sup> *Knesset ha-Gedolah*, *Hoshen Mishpat* 12, *Haga’ot Beit Yosef*, note 9; *Bi’ur ha-Gra*, *Sefer Mishlei* 2:20; *Teshuvot Maharsham*, vol. 7, no. 191; Rabbi Ben Zion Uzziel cited in M. Findling, *Tehukat ha-Avodah*, Jerusalem: 1945, 133.

<sup>41</sup> *Yerushalmi*, *Gittin* 3:7; Rabbi Shmuel ha-Sefardi, *Commentary on Horayot* 10b, Vilna Edition of the Talmud; *Teshuvot Minhat Yitzhak*, vol. 5, no.

Rabbi Salant notes, the invoking of this concept equally applies if the communal institution will incur a financial loss.<sup>42</sup> Alternatively, other authorities have argued that a public institution must conduct itself *lifnim mi-shurat ha-din* due to its status as an *adam hashuv*, i.e., a distinguished individual. In the words of one rabbinical court,<sup>43</sup> a communal institution

“has a greater duty to appease complaints and arguments...and it is duty-bound to deflect criticism from its institution...”

In effect, the invoking of considerations of *lifnim mi-shurat ha-din* upon a communal institution either based on its status as an *adam hashuv* or based on the concept “the community is not poor” creates a new line of liability, causing a result different from what would have occurred under the rubric of *din*.

The question is what would be the grounds for invoking *lifnim mi-shurat ha-din* within the context of awarding severance pay in general and regarding the economic situation of our Plaintiff in particular? Possibly, the first to apply concerns for *lifnim mi-shurat ha-din* was Rabbi Hayyim b. Baer Rapaport of nineteenth-century Russia who compelled a community to pay compensation to a dismissed *shohet*, i.e., ritual slaughterer, due to the fact that he was destitute with dependents.<sup>44</sup>

In our scenario, we are dealing with a plaintiff with limited economic means. On the level of *din and pesharah*, we are exhorted in the strongest of terms to refrain from taking such factors into consideration when resolving a case.<sup>45</sup> Consequently, according to the *din*, the financial situation of the Plaintiff is irrelevant. However,

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121 accompanying infra n. 42–43. See also R. Herzog, *Pesakim u-Ketavim*, vol. 9, *Teshuvot, Hoshen Mishpat*, no. 88. For these sources as well as the sources cited in the text accompanying infra n. 40–41, see Ron Kleinman, “The community is not poor,” (in Hebrew), 20 *Sidra* 195 (5765).

<sup>42</sup> *Teshuvot Binyan Av*, vol. 1, no. 38, section 3 in the name of Rabbi Salant.

<sup>43</sup> Jerusalem Supreme Court of Appeals, *Osaf Piskei ha-Din* [Z. Warhaftig, ed.] 1: 110, 114. See also, *Shakh Hoshen Mishpat* 420:9; *Teshuvot Ahiezer*, vol. 4, no. 68; *Teshuvot Mishneh Sahir Hoshen Mishpat*, no.4.

<sup>44</sup> *Teshuvot Mayim Hayyim, Oraḥ Hayyim* no. 6 cited by *Pitḥei Teshuvah, Hoshen Mishpat* 333:3.

<sup>45</sup> *Vayikra* 19:15, *Mishnah Ketubot* 84a; *Shulḥan Arukh, Hoshen Mishpat* 17:10.

on the plane of *lifnim mi-shurat ha-din*, the Plaintiff's financial circumstances may be factored into consideration when arriving at a decision. As a thirteenth-century *teshuvah* states:<sup>46</sup>

“Since Reuven is economically limited, it is proper for the community to act *lifnim mi-shurat ha-din*.”

At first glance, it would seem plausible to conclude that the Defendant, as a communal institution halakhically viewed as having “deep pockets,” should dispense such a benefits package. Nevertheless, the resolution of a matter based upon *lifnim mi-shurat ha-din* obligates a Beth Din panel to look at all the surrounding circumstances of the case. On one hand, the economic situation of the Plaintiff may propel a Beth Din to mandate a severance package; yet, on the other hand, Plaintiff's act of thievery of Defendant's assets precludes this panel from issuing such a mandate.<sup>47</sup>

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<sup>46</sup> *Teshuvot Maharach Obr Zarua*, no. 222 which is cited approvingly by R. Asher Weiss, *Kovetz Darkhei Hora'ah*, vol. 5, 97.

<sup>47</sup> *Teshuvot Minh'at Yitzhak*, vol. 6, no. 167; 9 *Ha-Yashar ve-ha-Tov*, vol. 9, pp. 184, 191–192 (5770). Cf. *Teshuvot Iggerot Moshe*, *Hoshen Mishpat*, vol. 1, no. 76; *Teshuvot Tzitz Eliezer*, vol. 7, no. 48:10.

## DECISION

1. The Defendant, as a communal educational institution, had the authority to terminate a teacher's employment at the expiration of the term of the contract without first receiving a definitive ruling of a Beth Din and that there are halakhically acceptable grounds for dismissal. Hence, we may choose to refrain from adjudicating whether the grounds for dismissal were justifiable or not.

2. Nevertheless, we have decided to address the merits of the Yeshiva's failure to renew his contract. Given the Defendant's right to deny rehiring the Plaintiff under the circumstances, was their action justifiable? Upon review of the evidence presented by the parties, the Beth Din recognizes the talents of Rabbi Cohen as an educator; a fact attested to by Yeshiva Har Tzvi administration. However, his educational credentials and pedagogical achievements notwithstanding, a teacher must be simultaneously aware of the Torah values espoused by the Yeshiva as well as the values promoted in the homes of his students. Plaintiff's improper behavior relating to theft of the Yeshiva's assets undermines the Yeshiva's mission and subverts his ability to serve as a halakhically-ethical model for the students to emulate.

Given the facts of the case, we thus find that the plaintiff's removal by defendant for malfeasance was justifiable and consequently, there are neither grounds for reinstatement, nor for reimbursement for "lost wages" accrued between his termination date and convening this Beth Din hearing or a basis for the awarding of severance.

3. In summary, all of the claims of the Plaintiff are hereby dismissed.

The obligations set forth herein shall be enforceable in any court of competent jurisdiction, in accordance with the rules and procedures of the arbitration agreement.

IN WITNESS WHEREOF, we hereby sign and affirm this Order as of the date written above.

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Dayan

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### Final Thoughts:

To award severance to only a *melamed* regardless of whether the *minhag* of the Yeshiva and/or the community was to award or not to award such monies in the past to a *melamed* is a contravention of halakha. One may award severance to a *melamed* either due to the fact that one grants such relief to every employee or due to the fact that the *minhag* of the community or the Yeshiva is to award such monies to a *melamed*.

**Should such relief be forthcoming,** it is to be awarded across the board to all employees either as a form of *ha'anakah*, based upon the practice of the yeshiva and/or community, or based upon *lifnim mi-shurat ha-din*.

As noted, there is no guarantee that a *dayan* will recognize an employee's entitlement to severance pay. Given that there is no mention of such entitlement either in the Talmud or the classical restatements, absent a provision in the labor agreement to the contrary, some *dayanim* will refrain from granting such relief to an employee.

Given the almost complete silence of earlier sources regarding this matter, it is unsurprising to find that numerous contemporary decisors will invoke at least two of the above grounds for awarding severance. See *PDR* 1: 330–332, 4:127–129; *Teshuvot Minhat Yitzhak*, vol. 6, no. 167; *Teshuvot Tzitz Eliezer*, vol. 7, no. 48:10; *Teshuvot ve-Hanhagot*, vol. 3, no. 473.

Should severance be awarded, the amount will be either based on the practice of the particular economic sector, 8.333% per year of employment (*hodesh le-shanah*) which is the formula endorsed by Israeli Rabbinical courts or is based upon the Beth Din's discretion. See *PDR* 1:332; 3:272, 287, 4:126; 8:162; *Teshuvot be-Zeil ha-Hochmah*, vol. 3, no. 100; *Teshuvot Minhat Yitzhak*, vol. 6, no. 167; *Teshuvot Yam ha-Gadol*, no. 22. In the absence of a practice prevailing in a particular economic sector, in the institution wherein the individual is employed or the community regarding the amount of a severance award, generally speaking *dayanim* in the NJ–NY metropolitan area who endorse the propriety of rendering such an award will grant severance based upon the formula of *hodesh le-shanah*. ❧