

Headlines



Halachic Debates of Current Events

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Poaching Employees from Rival Companies

BACKGROUND

In May, 2011, a class action lawsuit was filed on behalf of 64,000 employees of some of the largest technology companies in Silicon Valley – Adobe, Apple, Google, Intel, Intuit, Pixar and Lucasfilm – against their employers. The suit alleged that the companies had made a series of agreements, committing not to “poach” each other’s employees, which, according to the plaintiffs, limited their compensation, mobility and advancement.

“Poaching” is a common practice in the cut-throat world of corporate competition, and is done when a company eyes an especially skilled or productive employee working for a competitor, and then lures that worker away from his or her current job by offering more attractive conditions. Bringing in an employee from a competitor can not only raise the quality of a company’s staff, but also give it access to the strategies and connections of the competitor. Of course, poaching also benefits employees, as companies fiercely compete with one another for talented staff to improve their operations and thereby increase revenue, and thus offer higher salaries and better conditions to attract the best personnel. Additionally, employee poaching is seen as advantageous to industry as a whole, as it facilitates a free flow of shared information, knowledge and strategies. When successful employees migrate from one corporation to another, they share the proficiency and experience they gained in their previous positions, thereby raising the standards of corporate production and efficiency, as well as the quality of goods and services throughout the market.

On the other hand, poaching hurts companies by allowing salaries to rise, and also by the compromised efficiency resulting from a constantly revolving door. Every lost worker means a process of training for his or her replacement, which can undermine a business’ ability to meet its deadlines and serve its customers efficiently. Case in point, the aforementioned Silicon Valley companies allegedly colluded to prevent poaching in order to keep their employees’ wages at bay and to limit staff turnover.

The suit ended with a series of large out-of-court settlements between the various plaintiffs and the defendants. The process was completed at the end of 2015, when the final employees received their share of the multimillion-dollar settlement. What does halacha have to say about such practices?

QUESTIONS TO CONSIDER

- Is an employee allowed to leave his employer to work for another company?
- May an employer actively try to poach employees from a competitor?

THE RIGHTS OF AN EMPLOYEE

The Gemara is emphatic about of the rights of an employee to leave his or her employer, suggesting that to not allow an employee leave would be tantamount to slavery:

Bava Metzia 10a

<p>But Rav said: A worker may retract [his offer to work] even halfway through the day... because it is written, “Because Bnai Yisrael shall be servants to Me” They shall be My [Hashem’s] servants and no one else’s servants</p>	<p>והאמר רב פועל יכול לחזור בו אפי' בחצי היום... דכתיב (ויקרא כה) "כי לי בני ישראל עבדים" עבדי הם ולא עבדים לעבדים</p>
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Rav says that not allowing a worker to leave whenever he wants binds the worker in such a way that is unacceptable for a true servant of God. Workers must always retain a measure of freedom, which includes leaving when they choose and not being tied down to their employers.

QUESTIONS TO CONSIDER

- Why is the Torah insistent on people not becoming “enslaved”?

The Shulchan Aruch codifies this law and adds that the employee is even exempt from paying for the added expense the employer faces from hiring a replacement. Rama agrees, but with an important proviso which he quotes in the name of the Ri:

Rama, Choshen Mishpat 333:3-4

And only if he retracts normally, but if he retracts due to a higher price, we do not listen to him ודוקא שחזר סתם, אבל אם חוזר מכח יקר, אין שומעין לו

Several Acharonim understand this to mean that a worker has the right to leave his job only if he wishes to stop working altogether, but not if salaries have risen in the interim and so he wishes to break his agreement with his current employer to earn higher pay elsewhere. The Bach explains that as the basis for a worker’s right to leave his job is the notion that an unbreakable employment contract constitutes a kind of “enslavement,” it applies only to workers who wish to be “freed” from employment. If, however, a worker accepts the conditions of “enslavement” but wishes to leave from one “master” to another, he has no right to break his agreement.

QUESTIONS TO CONSIDER

- What does the Bach define as “slavery”?

The Aruch Hashulchan, however, says that the Ri did not dispute the employee’s right to leave, just his immunity to damages to his former employer. If he leaves for a higher-paying employer, he must reimburse his former employer if replacing him will cost money.

Furthermore, the Chazon Ish writes everyone would agree that an employee may leave for any reason so long as he gives his former employer significant prior notice.

INTERIM SUMMARY

- The Gemara says that an employee who wishes to leave his employer may do so
- The Shulchan Aruch adds he is exempt from recompensing his former employee
- The Bach and others interpret the Ri to say that if the employee is leaving for a higher-paying job, he may not leave
- The Aruch Hashulchan argues and says the Ri just means he is not exempt from damages
- The Chazon Ish says that even the Bach would agree that he may leave if he gives prior notice

In the modern workplace, where informing one’s employee before leaving is basically mandatory, it would seem that an employee always has a right to leave. It should be noted that even after he leaves, he would be forbidden to reveal anything about his former company without permission, as there is a general issur against revealing secret information about others against their will.

While the right of the employee to leave is basically undisputed, whether a competitor may actively attempt to woo him is another question. The Gemara discusses a similar ethical question:

Kiddushin 59a

He [Rav Yitzchak Nafcha] said to him [Rav Aba]: If a poor man is searching for an object in the trash and someone else comes and takes it, what is the din? He responded: That man is a Rasha!

אמר ליה עני מהפך בחררה ובא אחר ונטלה הימנו מאי אמר ליה נקרא רשע

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The Gemara says that if a pauper (ani) is in a trash heap trying to acquire a specific object and someone else snatches it from him, this person is called evil. This is true even though the ani never actually acquired the object, and the second person did nothing illegal! If so, what did the second person do wrong?

There is a dispute amongst the Rishonim as to the exact circumstances of the case and, by extension, the nature of the transgression. Rashi claims that the object was hefker (ownerless), yet by claiming it, the poacher worsened the poor man’s life and is thus called a rasha.

Tosfot object, claiming that had the object truly been hefker, there would be no problem in the second man taking it, seeing as they are both entitled to it. They explain the case differently:

And Rabainu Tam says that the issur of “מהפך” that is mentioned here is only relevant specifically if the pauper is attempting to do business or buy something and his friend comes first and acquires it... and for this reason he is called a rasha, because why did he pursue this [object] that his friend [the pauper] worked for? Let him go and buy it somewhere else! But if the pile was hefker there would be no issur because had he not claimed this one he could not find another

ואומר ר"ת דאיסור דמהפך דנקט הכא לא שייך אלא דוקא כשרוצה העני להרויח בשכירות או כשרוצה לקנות דבר אחד וחבירו מקדים וקונה... ומש"ה קאמר דנקרא רשע כי למה מחזור על זאת שטרח בה חבירו ילך וישתכר במקום אחר אבל אם היתה החררה דהפקר ליכא איסור שאם לא זכה בזאת לא ימצא אחרת

Tosfot explain that the entire issur is only in a case where the object in the trash heap was for sale. Since one could have just as easily acquired his object somewhere else and decided to specifically buy the object the ani was trying to get, he is a rasha because he needlessly made life difficult for someone else. However, had the pile been hefker and the financial opportunity not been ubiquitous, Tosfot would disagree with Rashi and say there is nothing wrong with taking the object before the ani gets it, seeing as there is no reason to favor the ani over the other person.

QUESTIONS TO CONSIDER

- Why would Tosfot be reluctant to explain like Rashi?

Rashi seems to say that it is wrong to claim anything in which another person has an invested interest, regardless of his legal claim to it. Thus, Rashi would say that even if an employee has a right to leave, it is wrong for a rival company to attempt to steal him.

Tosfot, following their own logic, arrive at a conclusion in a similar case that is more like our question:

Tosfot, ibid.

If a homeowner rents a torah teacher, another homeowner can rent him out to teach him [instead], and the first homeowner is not allowed to tell him “go and rent a different teacher,” because he [the second homeowner] can say to him [the first homeowner], “I only want this one, because it appears to me that this one teaches my son better than any other would”

אם שכר בעה"ב מלמד אחד יכול בע"ה אחר לשכור אותו מלמד עצמו ואינו יכול לומר לו הבעה"ב לך ושכור מלמד אחר דנימא ליה אין רצוני אלא לזה שהרי כמדומה לי שזה ילמוד בני יפה ממלמד אחר

Tosfot rule that so long as the employee is unique enough that he cannot be found elsewhere, anyone may claim him away from his current employer.

INTERIM SUMMARY

- If an ani is trying to acquire an object and someone else comes and grabs it first, he is called a Rasha
- Rashi explains that this is even if the object in question was hefker
- Tosfot says that in a case where the object was hefker, it would be permissible to grab it. One is only forbidden to grab it if he could easily acquire it elsewhere.
- Tosfot therefore say that one may hire out his friend's teacher if the teacher's skills are unique

The Rama (Choshen Mishpat 237:1) paskens like Tosfot. The Shulchan Aruch quotes both shitot and then quotes the ruling of Tosfot regarding a teacher, heavily implying that he too agrees with the position of Tosfot.

The Aruch Hashulchan, however, writes that the Shulchan Aruch would agree with Rashi! He explains that the Shulchan Aruch only paskened like Tosfot in regard to a Torah teacher for a unique reason:

Aruch Hashulchan Choshen Mishpat 237:5

And the [ruling of] “a pauper in a trash heap” does not apply here, because this is not a monetary issue, but an issue of a mitzva [learning Torah]. But the reason [to be lenient] is not because the teacher is unique

ואין שייך בזה מהפך בחררה דאין זה דבר
שבממון אלא דבר מצוה ואין הטעם משום דבר
שאינו מצוי

The Auch Hashulchan explains that the reason the Shulchan Aruch paskened like Tosfot in regard to a teacher was not because he agreed with Tosfot in other cases, but rather because teaching Torah is a mitzva, so one is not called a rasha for poaching. However, in regard to any other type of employee, the Aruch Hashulchan would say that one is not allowed to poach such an employee because the Shulchan Aruch fundamentally agrees with Rashi.

QUESTIONS TO CONSIDER

- Why would a mitzva be an exception to the rule of Rashi?

The Avnai Nezer (Choshen Mishpat 17) was asked this very question and concluded that we pasken like Tosfot in all cases, not just Torah teachers, contrary to the psak of the Aruch Hashulchan.

INTERIM SUMMARY

- The Rama and Avnai Nezer pasken like Tosfot: poaching is legal if the employee isn't available elsewhere
- The Shulchan Aruch is ambiguous but certainly agrees with Tosfot in regard to Torah teachers that they may be poached
- The Aruch Hashulchan says that this is unique to Torah teachers because learning is a mitzva but all other types of poaching would be forbidden, as Rashi says

There is one final consideration that needs to be addressed, and it comes from a Gemara:

Bava Batra 21b

We distance fish nets from other fish [nets] the length a typical fish travels. And how much is this? Raba ben Rav Huna says a parsas

מרחיקים מצודת הדג מן הדג כמלא ריצת הדג
וכמה אמר רבה בר רב הונא עד פרסה

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Tosfot there attempt to reconcile this Gemara with the previous ruling in Kiddushin about the trash heap:

And even though Rabainu Tam explained [in Kiddushin] that when the object is hefker you aren't even called a rasha [for taking it]... it is not a question... because here [is different because] his livelihood comes through it

אע"ג דר"ת מפרש בדבר של הפקר אפי'
רשע לא מיקרי... לא קשיא... דהכא
אומנותו בכך

Tosfot realize that the Gemara here seems to contradict their ruling that there is never a problem of taking something that is hefker. The fish are also hefker, so why can't one set up his net wherever he wants? Tosfot answer that when it comes to a person's means of sustenance, it is forbidden to interfere with his enterprise by seizing assets which he has already eyed. It is wrong to deprive someone of something if that is how he supports himself. Tosfot must hold that the case of the ani and the trash heap is only if the ani doesn't support himself that way. If the "find" is something pertaining to a person's livelihood, others may not interfere once that person has expressed interest.

QUESTIONS TO CONSIDER

- At the end of the day, how different are the opinions of Rashi and Tosfot?

A number of Rishonim maintained that halacha does not follow the view cited by the Gemara requiring fishermen to distance their nets from a bait which had already been placed. But Tosfot clearly do, and as we state before, many influential poskim pasken like Tosfot, so it would be difficult to dismiss this Gemara.

Therefore, Rav Tzvi Shpitz, in his Mishpetei Ha'Torah (1:50) rules that poaching is forbidden if this would result in significant damage to the competitor's livelihood. Rav Shpitz adds, however, that although one may not directly work to recruit employees under such circumstances, it is permissible to advertise employment opportunities in the hope of arousing the interest of the competitor's current staff.

CONCLUSION

Practically speaking, an employee may always quit his job. There is a machloket between Rashi and Tosfot if one may poach an employee, based off of their shitot regarding the case of the ani in the trash heap. Rashi says it is forbidden, and Tosfot allows it. Many poskim hold like Tosfot but the Aruch Hashulchan says the Shulchan Aruch holds like Rashi. Tosfot themselves seem to say poaching is forbidden when the competitor's livelihood is threatened.

DISCLAIMER:

The views and opinions presented in this sourcesheet should not be taken as *halachah l'maaseh*. Before applying these halachos to real-life situations, one must consult with a competent halachic authority.

