Published Decision: Depriving a Worker of Employment Opportunities

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The Beth Din of America recently published *Chaya Plaut v. Anshei Troy Synagogue* (the anonymized decision can be accessed here). This post summarizes the facts of the case, analyzes the halakhic principles underlying the dayanim's decision, and discusses whether secular law would yield a different outcome.

I. The Case

Chaya Plaut was hired as a Talmud Torah teacher at Anshei Troy Synagogue for the 2001-2002 school year. In March or April of 2002, the Synagogue renewed her contract for the 2002-2003 school year to teach about 5.5 hours a week with a salary of $10,600. Although her contract was renewed for one year, the Synagogue "had conveyed the sense that Mrs. Plaut would have long-term employment" with them.

In May 2003, the Synagogue leadership hired a new rabbi. They asked him to take over Mrs. Plaut's teaching responsibilities for the upcoming school year in order to consolidate the two positions and reduce their expenses, to which he agreed. The Synagogue never told Mrs. Plaut that they were looking to eliminate her position, despite their active search for a rabbi who could also take over her job. On May 27, the Synagogue leadership informed Mrs. Plaut that her contract would not be renewed for the 2003-2004 school year.

The heart of the *din torah* is whether it was wrong for the Synagogue to wait until the end

of May to inform Mrs. Plaut that her contract would not be renewed. Mrs. Plaut argued that by signaling to her that she would have long-term employment and then informing her so late in the year that her contract would not be renewed the Synagogue deprived her of the opportunity to secure alternative employment for the 2003-2004 school year. Mrs. Plaut argued that religious schools hire well before May or June, and it is nearly impossible to enter the job market in June and secure a position by September. She testified that after having been notified by the school that her contract would not be renewed she sought employment elsewhere. But her efforts were to no avail. The Synagogue countered that three months was ample time to find a new job.

The dayanim ruled for Mrs. Plaut. In their decision, they held that "given the academic calendar and hiring schedules of most religious schools… Mrs. Plaut was not given sufficiently early notice to enable her to find a replacement position for 2003-2004… Mrs. Plaut would likely have found an alternative position if the Synagogue had informed her [earlier in the year]."

The dayanim's decision unfolds in three stages and appeals to three separate principles of Jewish law. The first principle is that an employer can become liable for causing a worker to lose alternative employment opportunities. The second principle is the idea of *po'el batel* (that a worker benefits from not having to work) which reduces the amount of damages an employer has to pay for depriving a worker of alternative employment opportunities. The third principle is the dayanim's equitable determination, similar to the common law doctrine of comparative negligence, that Mrs. Plaut bears some responsibility for her loss, as she should have sought to clarify her employment status with the Synagogue earlier in the year.

In the next section, we discuss the three components of the dayanim's decision and their halakhic bases.

II. Halakhic Analysis

A. Depriving a Worker of Alternative Employment Opportunities

The basis for the Synagogue's liability is that they caused Mrs. Plaut to lose out on alternative employment opportunities by first creating the expectation of long-term employment and then notifying her at the very end of the school year–when it was effectively impossible for her to secure employment elsewhere–that her contract would not be renewed.

The paradigm for this type of liability is the Talmud's ruling in Bava Metzia 76b, codified in Shulchan Arukh Choshen Mishpat 333:2. The Talmud discusses the following type of scenario: A homeowner calls a handyman and tells him to show up at 8 o'clock the next morning to do work in the house. An hour before 8, the homeowner decides he doesn't

want the work and cancels on the handyman. Suppose that but for the homeowner's instruction to show up at 8, the handyman could have (and would have) secured other jobs for the day. The Talmud holds that the homeowner is liable to compensate since he harmed the handyman by causing him to lose the other job opportunities. [2]

Most commentators understand the Talmudic case to be one where no contractual relationship existed between the handyman and the homeowner. In the eyes of halakhah, the initial phone call does not rise to the level of a contract. [3] Commentators offer three separate grounds for the homeowner's liability. First, many rishonim see the homeowner's liability as grounded in the halakhic principles of tort (*dina de-garmi*). The homeowner harmed the handyman by causing him to lose income from the job opportunities he turned down, and he is therefore obligated to compensate him. [4]

A second view in the rishonim suggests that liability arises from a principle of implied indemnification (*arev*). [5] In their view, when the homeowner asks the handyman to arrive at 8 the next morning, he is effectively instructing the handyman to turn down other jobs that would conflict and is implicitly agreeing to indemnify the handyman from those losses, up to the value of the 8 o'clock contract. [6] The basis of liability, on this view, is the homeowner's implied commitment to indemnify the worker (*arev*). [7]

A third view in the poskim holds that there is no pure-halakhic basis for liability in this type of pre-contract case. On this approach, as a matter of halakhic private law the homeowner should not be liable at all: his actions are too weak to rise to the level of a tort, and there is no reason to read-in an implicit indemnification. Rather, the homeowner's duty to compensate arises out of a public policy *takanah* (enactment) that was instituted to protect parties from losses when relying on the other party in a pre-contractual relationship. [8] Although there is no pure-legal basis to hold the homeowner liable to compensate the worker before there is any contract, *chazal* sought to deter parties from canceling work-arrangements when it would detrimentally affect the other party who reasonably relied on the arrangement and to protect the interest of the party who would otherwise suffer a loss.

There are, then, three possible bases for the homeowner's liability to compensate the handyman in depriving him of alternative employment opportunities: tort (*garmi*), implied indemnification (*arev*), or public policy (*takanah*). [9]

Whatever the ground of liability, Jewish law does require an inquiry into whether the handyman in fact could have received alternative employment opportunities. [10] The dayanim in Chaya Plaut v. Anshei Troy Synagogue determined that "Mrs. Plaut would likely have found an alternative position if the Synagogue had informed her [earlier in the year]."

The dayanim in Chaya Plaut v. Anshei Troy Synagogue seem to hold that the Synagogue's signaling to Mrs. Plaut that she would have long-term employment and their notifying her in late May without prior warning that her contract would not be renewed is analogous to the homeowner-handyman case. In their view, the Synagogue caused Mrs. Plaut to lose alternative employment opportunities by not notifying her earlier in the year, and therefore it has a duty to compensate. The dayanim's ruling might be supported by an industry-wide norm–itself a function of hiring schedules in Jewish day schools–to notify day school teachers early in the year if their contract will not be renewed. [11]

B. The *Po'el Batel* Rule

Having decided that the Synagogue has a duty to compensate, the dayanim consider the amount owed. The dayanim begin with Mrs. Plaut's salary for 2002-2003 ($10,600) as their point of departure [12] but argue that the amount should be reduced in accordance with the *po'el batel* rule. This rule, which appears in the Talmud (Bava Metzia 76b) and is codified in Shulchan Arukh (Choshen Mishpat 333:2), provides that when an employer is obligated to pay damages for causing a worker to lose alternative employment opportunities, the damages should be reduced in consideration of the benefit the worker receives by not having to engage in labor.

Suppose, for example, that relying on the homeowner's instruction to show up at 8 the next morning, the handyman turned down a labor-intensive job that would have paid $500. When the homeowner cancels and thereby becomes liable for causing the worker to lose the $500 job, the *po'el batel* rule says that the $500 liability should be offset and reduced by the benefit the worker receives by not having to do labor-intensive work.

How is the *po'el batel* reduction calculated? Rashi explains (Bava Metzia 76b s.v. '*oseh*) that we evaluate how much less pay a worker would be willing to receive to *not* have to do the difficult labor but still get paid. Suppose that I rely on your promise to hire me tomorrow at 8 and turn down a job to de-weed someone else's garden that was worth $500. De-weeding is difficult labor, and I'd be willing to lower my pay to $300 for a leisurely job like watering flower pots. When you cancel the 8 o'clock job and become liable to compensate me for my loss of the $500 job offer that I turned down relying on your promise, the *po'el batel* rule reduces the amount you owe me from $500 to $300, since I capture the $200 benefit of not having to do the difficult labor. If I capture further benefit by not having to work at all, then the po'el batel rule would reduce the amount even further–by the amount of benefit I receive by getting the day off. [13]

Some poskim suggest that instead of evaluating the subjective benefit in each case, the *po'el batel* reduction should be standardized (at least in simple cases) and valued at 50% of the contract price. [14] The dayanim in this case follow the 50% rule. They take Mrs. Plaut's compensation from 2002-2003 ($10,600) as the baseline for the Synagogue's liability and

reduce it by 50% (to $5,300) in consideration of the *po'el batel* rule. In their view, Mrs. Plaut's benefit of not having to teach and prepare classes for 2003-2004 was worth 50% of her contract. [15]

C. Contributory Negligence

The final consideration the dayanim raise is whether Mrs. Plaut was partially responsible for her own loss by not clarifying her employment status earlier in the year. They write:

"we find that the Synagogue is not solely responsible for Mrs. Plaut's being without a replacement position for 2003-04. While Mrs. Plaut believed that her job at the Synagogue was secure, she had only two years of tenure at the Synagogue, a year-to-year contract (the second year of which was oral, rather than written), and an ill/unavailable supervisor. In this context, she should have proactively sought to clarify her employment status for the following year earlier in 2003."

In finding Mrs. Plaut partially responsible for her loss, the *dayanim* are engaged in an analysis of Mrs. Plaut's contributory negligence. They found the Synagogue liable for not notifying Mrs. Plaut earlier in the year; now they find Mrs. Plaut partially responsible for not clarifying her employment status, given her short tenure and her year-to-year contract.

Having determined that Mrs. Plaut was contributorily negligent, the dayanim reduce the final award by about 25%, from the *po'el batel* amount of $5,300 to $4,000. The dayanim's reduction of the Synagogue's liability based on Mrs. Plaut's contributory negligence parallels the common law doctrine of comparative negligence, which reduces the amount of damages a plaintiff can recover based on the degree to which the plaintiff's own negligence contributed to the harm. [16]

In sum, the dayanim found the Synagogue liable for terminating Mrs. Plaut so late in the year, which caused her to lose other employment opportunities. To assess the amount of damages, the dayanim start with the value of Mrs. Plaut's contract with the Synagogue from 2002-2003 ($10,600) but cut it in half (to $5,300) because of the *po'el batel* rule. The dayanim then reduce that amount by about 25% (to $4,000) in consideration of Mrs. Plaut's own negligence. Ultimately the dayanim award Mrs. Plaut $4,000.

III. Secular Law Analysis

In our earlier posts, we discussed Jewish law's incorporation of commercial custom (*minhag ha-sochrim*). In Chaya Plaut v. Anshei Troy Synagogue, there was no choice of law clause opting for secular law, and the dayanim apparently found that the case should be decided according to the pure principles of Jewish law. [17] In the next section we consider whether a different outcome would have been reached if the dayanim had decided the case according to secular law.

How would the outcome of this case differ under a secular law analysis? Mrs. Plaut's claim might be analyzed as a breach of contract claim, or under a promissory estoppel (reliance) theory. However, it is unlikely that she would have been able to recover any damages on either claim — particularly under New York law, which is especially protective of an employer's right to discharge an employee at any time. [18]

Breach of Contract

To establish a breach of contract claim, a plaintiff must show that an enforceable contract existed prior to the alleged breach. In this case, Mrs. Plaut would have had to establish that a teaching contract for the 2003-2004 school year already existed on May 27, 2003, when the Synagogue informed her that her contract would not be renewed. If such a contract did exist, then this may well have constituted breach.

However, the parties in this case do not appear to have entered into either an express or implied contract for the 2003-2004 school year. An express contract is "a promise stated in words either oral or written," [19] while an implied contract is inferred from the conduct of the parties and "the facts and circumstances of the case." [20] The *psak* makes clear that the parties never expressly contracted for the 2003-2004 year. But Mrs. Plaut may argue — and in essence does argue — that an implied contract was formed by the Synagogue keeping silent until it was too late for her to find another position for that school year.

However, Mrs. Plaut's implied contract argument would likely fail, because the Synagogue never provided an affirmative indication of its intent to rehire her for the 2003-2004 school year. A court may recognize an implied contract where the parties have, through their actions, indicated an intention to contract. [21] However, "mere silence or inaction [by the party to be charged] is insufficient," [22] and a contract "will not be implied unless the meeting of the minds was indicated by some intelligible conduct, act or sign." [23] As the *psak* notes, both parties had stayed silent regarding Mrs. Plaut's employment status for the 2003-2004 school year. It is thus unlikely that a court would infer that an implied contract had indeed been reached. And if there was no legally cognizable contract, then there would be no basis for asserting breach.

Promissory Estoppel

If there was no contract and thus no breach, the most relevant common-law doctrine might be promissory estoppel. Promissory estoppel provides for the enforcement of a promise which is otherwise unenforceable as a contract, when the plaintiff reasonably relied on that promise to his or her detriment. To sustain a promissory estoppel claim, a plaintiff must allege "a clear and unambiguous promise; a reasonable and foreseeable reliance by the [plaintiff]; and an injury sustained by the [plaintiff] by reason of his reliance." [24]

In this case, Mrs. Plaut could argue that she relied on the Synagogue's March 2002 indication of long-term employment by not seeking other employment for 2003-2004 until it was too late to do so. However, a promissory estoppel claim would likely fail on the first element, because the Synagogue did not clearly and unambiguously promise it would renew Mrs. Plaut's contract — the Synagogue merely "conveyed the sense" that it would employ her long-term.

In a case with similar facts, a school informed a teacher orally and in writing that she would be offered a contract for the following school year. [25] The school then informed her in May that she would not be rehired. [26] The court dismissed the teacher's promissory estoppel claim, finding that the school's promise that her contract would be renewed lacked the requisite definiteness, and "manifested no present intention" to enter into a contract. [27] In our case, the Synagogue's promise was even more nebulous and thus almost certainly unenforceable under promissory estoppel. [28]

Moreover, a promissory estoppel claim under New York law would be even less likely to succeed: several cases have suggested that promissory estoppel in the employment context is generally unavailable in New York. [29] The jurisdiction's strong presumption that an employee may be terminated at will may make reliance on a promise of continued employment by definition unreasonable. [30]

Damages

Finally, with respect to damages, damages awarded for breach of contract usually consist of expectation damages, which aims to put the non-breaching party in the same position it would have been had the contract been performed. [31] In this case, expectation damages would be the salary the plaintiff would have received for the 2003-2004 school year, subject to the plaintiff's reasonable efforts to obtain alternative employment.

Damages awarded under promissory estoppel "may be limited as justice requires," [32] and usually consist of either reliance damages — actual costs incurred upon reliance on the promise — or expectation damages — the value of the promise had it been kept. [33] Because Mrs. Plaut did not allege any reliance costs, had she prevailed on a promissory estoppel claim she would likely have received the full expected salary, again subject to her reasonable efforts to obtain alternative employment.

1. Rabbi Itamar Rosensweig is a dayan at the Beth Din of America and a maggid shiur at Yeshiva University. Tzirel Klein is a J.D. candidate at Harvard Law School and a law intern at the Beth Din of America.
2. See for example Tosafot Bava Metzia 76b s.v. ein, "al yado nitbatlu oto ha-yom"; Ramban Bava Metzia 76b, "nitbatlu me-sekhirut ha-yom al yado." Note that the halakhah requires the handyman to mitigate his losses. See Shulchan Arukh Choshen Mishpat 333:2 and Pitchei Choshen Sekhirut 10:5-6.

3. For a contractual relationship to exist, according to halakhah, the parties have to perform a kinyan or the handyman would have to begin performance (hatchalat ha-melakhah). The halakhic liability rules are different once the parties are bound by a contractual relationship. See the next note below.
4. See for example Tosafot Bava Metzia 76b s.v. ein; Rosh Bava Metzia 6:2; Sema Choshen Mishpat 333:8. Dina de-garmi is a kind of indirect tort, where the tortfeasor is not the immediate cause of the harm. Liability for this category of non-proximate causation is a matter of Talmudic dispute. We hold that a tortfeasor in garmi is liable, though the liability rules of garmi are weaker than those of proximate cause. Two important halakhic consequences follow from the fact that liability arises under the principles of tort–from the fact that the homeowner caused the handyman to lose the other job–and not contract. First, for the homeowner to be liable, the handyman must have been able to secure other job opportunities, which he "lost" by relying on the homeowner's instructions. If the handyman couldn't have received other work for the day, the homeowner is not liable, as he did not cause the handyman any loss. (It becomes an interesting question of Jewish law whether the handyman has the burden to show that he could have secured alternative employment or if the homeowner has the burden to show that he could not have; see Pitchei Choshen Sekhirut Chapter 10 note 4.) Second, because the homeowner's liability arises in tort, the measure of damages is not what the handyman would have collected under a contract with the homeowner but rather what the handyman would have made from the alternative job offers. Of course, this counterfactual assessment of damages can be difficult to determine, so in many cases it's reasonable to assume that the handyman's compensation for an alternative job would be the same amount he was going to receive for the homeowner's job, which is what the dayanim assume in Chaya Plaut v. Anshei Troy Synagogue (see below). Note that the liability rules are different when a contractual relationship exists between the handyman and the homeowner. Under a contractual relationship, such as when a kinyan was performed or when the handyman commenced performance (see above, note 3), the homeowner must compensate even if the handyman could not have secured alternative employment, and moreover, the measure of damages is determined by what the homeowner was obligated to pay the handyman for the 8 o'clock job, not what the handyman would have made in the next-best alternative job offer. For these distinctions, see Ramban Bava Metzia 76b ("kevan she-hitchilu be-melakhah nitchayav me-'akhshav liten lahem sekharan meshalem kemo she-kibel 'alav, she-ke-shem she-she'ar ha-devarim niknin be-kinyan, kakh sekhirut po'alim niknet be-hatchalat melakhah…") ; Shulchan Arukh Choshen Mishpat 333:2 and Shakh 333:11; Pitchei Choshen Sekhirut 10:7 and note 18 therein; and Chazon Ish Bava Kamma 23:36 s.v. ve-nir'eh. Chazon Ish argues that if the basis for compensation is contractual, the homeowner has a duty to pay the handyman on time (bal talin), as if he had earned his wages ("sekhar zeh hu sekhar po'el mamash ve-lo garmi… ve-nir'eh de-'over 'alav be-val talin").

5. See Ritva Bava Metzia 73b s.v. hai; Ritva Bava Metzia 75b; Rabbi Akiva Eger, Derush ve-Chidush, Bava Metzia 76b, Pitchei Choshen Sekhirut 8:1 and note 4 therein.
6. Here I follow Ritva's formulation that the indemnification is for the handyman's loss of the alternative job he could have accepted. Thus the amount of liability is set at the value of the job the handyman "turned down" (or didn't pursue) relying on the homeowner's instruction. Ritva writes: "chayav le-shalem lo mah she-hifsid be-havtachato". But see Pitchei Choshen Sekhirut 8:1 who writes, "chayav be-mah she-hivtiach lo", which implies that the handyman collects expectation damages–the value of the 8 o'clock contract. The debate–whether the implied indemnification is for the value of the 8 o'clock contract or for the value of the loss of the next best job offer–turns on whether the implied indemnification rule works as a tort-like principle to protect the handyman from losing the value of the alternative job offer or whether it works as a contract-like principle to secure the handyman's claim to the 8 o'clock contract. Understood this way, the debate about implied indemnification (arev) tracks the discussion surrounding the common law's promissory estoppel, and whether it is a principle of tort or contract. See Randy E. Barnett & Mary E. Becker, Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations, 15 Hofstra L. Rev. 443 (1987). On this point, note R. Akiva Eger's formulation, Derush ve-Chidush Bava Metzia 76, that implied indemnification makes it "as if there was a kinyan" (havey kemo kinyan).
7. Some commentators argue that this implied indemnification exists only in cases where the handyman, relying on the homeowner's word, actually turned down an alternative employment offer. It's not sufficient, on this view, that the handyman could have found other employment. See Pitchei Choshen Sekhirut Chapter 10 note 10 and Chapter 8:1 and note 4 therein. Other commentators hold that for the homeowner to become liable under a theory of implied indemnification, the homeowner must know that he's causing the worker to lose other opportunities. On this view, it is reasonable to infer the homeowner's intent to indemnify the worker only when the homeowner is aware of the loss he would be imposing. See Pitchei Choshen Sekhirut Sekhirut 11 note 22 and note 38.
8. Netivot Ha-Mishpat 333:3. See also Tosefta Bava Metzia 11:27 and Shut Sha'ar Ephraim no. 138.

9. Note that whatever the ground of liability–whether it's tort (garmi), implied indemnification (arev), or public polity (takanah)–these same halakhot also protect the homeowner from a worker who cancels if the cancellation will cause the homeowner an immediate or irreparable loss (davar ha-aved). The principles underlying these halakhot are not designed to protect workers specifically but parties who make pre-contractual arrangements and appointments. The Talmud discusses several cases where the worker can become liable for the employer's losses when the employer relies on a pre-contractual arrangement (e.g. no kinyan) and the worker fails to perform. These include a person who arranges with a band to perform at a wedding or a funeral but the band never shows up, and an arrangement with a worker to harvest and process flax fibers (which ruin if not processed immediately). See Bava Metzia 75b and 76b; Rashba Bava Metzia 76b; and Hagahot Ashri Bava Metzia 6:2 ("chayavim le-shalem kol hefsedo").
10. See Shulchan Arukh Choshen Mishpat 333:2 and Pitchei Choshen Sekhirut 10:4.
11. Absent such a norm, we might wonder whether the Synagogue had any duty to inform Mrs. Plaut that her contract would not be renewed given that it was set to expire at the end of the school year.
12. Strictly speaking the baseline of liability would be the value of the job Mrs. Plaut "lost" by relying on the Synagogue. But as we saw earlier, in some cases it's reasonable to assume that the two amounts will more or less converge.
13. See Bava Metzia 76b, Rashi s.v. aval and s.v. 'oseh.
14. See Taz Choshen Mishpat 333 s.v. she-eino, citing Rabbenu Chananel and a teshuvah of Rashi.
15. The dayanim's use of the po'el batel reduction in Chaya Plaut v. Anshei Troy Synagogue is not as straightforward as it might appear. The Talmud (Bava Metzia 77a) conditions applying the po'el batel rule on the worker benefiting in fact from not having to work, and it recognizes that in some cases the worker receives no benefit from not working. In such cases, there is no basis for reducing the award. The Talmud (Bava Metzia 77a) offers an example of a mover who benefits from the workout of heavy lifting (akhlushey de-mechoza). Since the worker benefits from the labor–it saves him a trip to the gym–he is entitled to be paid in full when the employer cancels on him. Another example might include a surgeon who wants to keep up her surgical skills and therefore receives no benefit from the patient canceling. Some rishonim discuss the case of a Torah teacher who enjoys teaching. These rishonim argue that if the employer cancels, the teacher or rebbe would be entitled to their full salary (without a po'el batel reduction) since they receive little or no benefit from not teaching. See Teshuvot Ha-Rashba 1:643 ("im melamed zeh neheneh be-limmudo yoter me-heyoto batel noten lo sekharo mishalem, ve-im lav noten lo ke-po'el batel"), Mordekhai Bava Metzia 346, and Shulchan Arukh Choshen Mishpat 335:1.

16. Here the dayanim appear to be working under pesharah kerovah la-din. (On pesharah kerovah la-din, see Rabbi Itamar Rosensweig, "Pesharah vs. Din" Jewishprudence (April 2020).) Jewish law does recognize a principle of contributory negligence according to which the defendant would not be liable at all if the defendant was found to be more negligent than the plaintiff. See, for example, Yerushalmi Bava Kamma 2:8; Rambam Chovel 1:11; Tosafot Bava Kamma 4a s.v. kevan; Ramban Bava Metzia 82b ("ha-sheni pash'a be-'atzmo"); Shita Mekubetzet Bava Kamma 27b s.v. od katvu. See also Ralbag, Parshat Mishpatim, pg. 227, who holds that the defendant is not liable so long as the plaintiff was equally negligent ("she-lo yitchayev ha-mazik… im hayah ha-nizak hu ha-poshe'a yoter be-hag'at ha-nezek lo…. ve-khen ha-'inyan im hayu shneihem be-madregah achat me-ha-peshi'ah"). But there's no clear indication that Jewish law recognizes a principle that would reduce the defendant's liability in proportion to the plaintiff's comparative negligence. There is, however, a possible halakhic paradigm for comparative negligence, in Jewish law's principle of joint tortfeasors. According to this principle, each tortfeasor is liable in proportion to his contribution to the damage. See, for example, Pitchei Choshen Nezikin 10:25-27 and 10:31 note 77. Arguably, this principle can be extended to the case where the plaintiff (nizak) is negligent by considering the plaintiff, conceptually, as one of the tortfeasors by having contributed to his own loss. He would then be responsible for "his share" of the liability, which would reduce his co-tortfeasor's (the defendant's) liability in proportion to the plaintiff's comparative contribution of negligence. For this kind of argument, see Or Sameach Nizkei Mammon 12:19 and Pitchei Choshen Nezikin Chapter 10 note 55. What's controversial about this move is that it views the plaintiff as both plaintiff (nizak) and defendant (mazik) in the same cause of action.
17. See Rabbi Itamar Rosensweig, "Commercial Custom and Jewish Law" Jewishprudence (June 2020) for which factors determine whether a case should be decided according to minhag ha-sochrim or the other principles of choshen mishpat.
18. See, e.g., Murphy v. Am. Home Products Corp., 448 N.E.2d 86, 91 (N.Y. 1983) (Where "plaintiff's employment was at will, . . . the law accords the employer an unfettered right to terminate the employment at any time"). Although in this case Mrs. Plaut's employment may have been for a fixed term and was thus not at will, an employee is at-will for the purposes of the renewal of an expired fixed-term contract, as the employer has no duty to renew. See Rosen v. Vassar College, 525 N.Y.S.2d 399 (N.Y. App. Div. 3d Dept. 1988).
19. Maas v. Cornell U., 721 N.E.2d 966, 969 (N.Y. 1999) (quoting Restatement (Second) of Contracts § 4 (1981)).
20. Bader v. Wells Fargo Home Mortg. Inc., 773 F. Supp. 2d 397, 413 (S.D.N.Y. 2011) (quoting Bear Stearns Inv. Products, Inc. v. Hitachi Automotive Products (USA), Inc., 401 B.R. 598, 615 (S.D.N.Y.2009)).
21. Maas v. Cornell

22. In re Goodman, 790 N.Y.S.2d 837, 843 (N.Y. Sur. 2005), aff'd sub nom. Goodman v. Druck, 821 N.Y.S.2d 918 (N.Y. App. Div. 2d Dept. 2006) ("While an agreement can be implied, the agreement must be clear, unambiguous and unequivocal.").
23. Baltimore & Ohio R.R. v. United States, 261 U.S. 592, 598 (1923). Implied contracts sometimes are formed where parties continue to perform under an express contract even after the contract has expired by its own terms. See, e.g., Watts v. Columbia Artist. In those cases, a court might assume that the terms of the original contract apply to the new implied contract. Id. However, this is inapplicable in our case where Mrs. Plaut was told before the start of the school year that her services would not be necessary.
24. Esquire Radio & Elecs., Inc. v. Montgomery Ward & Co., 804 F.2d 787, 793 (2d Cir. 1986) (quoting Restatement (Second) of Contracts § 90).
25. D'Ulisse-Cupo v. Bd. of Directors of Notre Dame High Sch., 202 Conn. 206, 208 (1987).
26. Id. at 208–09.
27. Id. at 214–15. The court in D'Ulisse conceded the teacher may have a valid negligent misrepresentation claim. Id. In our case, a negligent misrepresentation claim arising out of the Synagogue's failure to inform Mrs. Plaut of its search for a rabbi who would replace her would likely fail under New York law, which recognizes negligent misrepresentation only when there is a fiduciary duty between the parties. A fiduciary duty is generally not recognized in an employee-employer relationship. Stewart v. Jackson & Nash, 976 F.2d 86, 90 (2d Cir. 1992).
28. See also Kelly v. Chase Manhattan Bank, 717 F. Supp. 227, 236 (S.D.N.Y. 1989) (employer's "general assurances of longevity with the company . . . cannot form the basis of a promissory estoppel").
29. See, e.g., Emmons v. City Univ. of New York, 715 F. Supp. 2d 394, 422 (E.D.N.Y. 2010), modified (July 2, 2010) ("New York law ... does not recognize promissory estoppel in the employment context"); see also Smalley v. Dreyfus Corp., 10 N.Y.3d 55, 59 (2008).
30. See Smalley v. Dreyfus Corp., 10 N.Y.3d 55, 59 (2008).
31. See Emposimato v. CICF Acq. Corp., 932 N.Y.S.2d 33, 36 (N.Y. App. Div. 1st Dept. 2011).
32. Restatement (Second) of Contracts § 90.

33. See Cyberchron Corp. v. Calldata Sys. Dev., Inc., 47 F.3d 39, 46 (2d Cir. 1995). The damages available under promissory estoppel reflect the larger question of whether the basis for liability in promissory estoppel sounds in tort law or contract law. See supra note 6; Mary E. Becker, Promissory Estoppel Damages, 16 Hofstra L. Rev. 131, 133–34 (1987). Reliance damages correspond to a tort theory of liability, while expectation damages correspond to a contract theory. Id. at 133. However, courts often limit reliance damages to actual costs incurred and do not include the value of lost opportunities, even where they arguably exist. Id. In those cases, the measure of expectation damages may in fact be the more complete measure of reliance. Id. at 133 n.13. See also supra note 4, 6. Still, in the present case, even if a court would allow lost opportunities to be included in reliance damages, it is unclear whether Mrs. Plaut would have been able to prove with sufficient certainty that she would have found another job had she been informed earlier.