

ARBITRAL DECISION-MAKING
IN LABOR AND EMPLOYMENT LAW

Sara Adler, Esq.
Dispute Resolution Services
1034 Selby Avenue
Los Angeles, CA 90024-3106
T: 310-474-5170; F: 310-474-6919
email: sadlerarb@earthlink.net

When I first heard the topic, my response was "very carefully" -- and what else is there to say. Upon further reflection, there's a lot to share¹, actually far more than can reasonably be included here. One of the most enlightening and entertaining discussions can be found in Volume 32 of the Proceedings of the National Academy of Arbitrators entitled "Decisional Thinking of Arbitrators and Judges" (BNA, 1980)²

While the timing varies between labor and employment³ arbitration because the information available starts at different places in the procedures, the bottom line is the same. A series of tentative decisions are made from the very beginning, subject to constant revision as more information comes in.

¹ I can only speak for myself after more than 25 years as a full-time arbitrator of labor and employment disputes because each arbitrator is likely to do things a bit (and maybe a lot) differently.

² The electronic version is available free at naarb.org under the tab "Proceedings".

³ I use herein what has become the accepted distinction - "labor" refers to cases in which the employee is represented by a union and "employment" refers to non-union employees.

The first item is to review the arbitration agreement which is likely in pre-dispute to be a provision in the collective bargaining agreement (CBA or labor agreement), an employer-required and non-negotiated agreement or a negotiated term of an individual employment contract such as those common for senior executives. For a post-dispute agreement, it is likely to be a stand-alone agreement either negotiated or a court mandated "agreement".

In labor agreements, the arbitrator pretty much accepts whatever the terms of the arbitration provision are, including any and all limitations on jurisdiction and any procedural rules, such as a limit on post-hearing briefing. The matter may be much more complex with pre-dispute employment agreements that, in my California-based practice, I need to verify comply with fundamental due process as delineated in such sources as the Due Process Protocol⁴ and *Armendariz v Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83 (2000). If the process of selection was balanced and any limitations are either acceptable or are susceptible to correction⁵, the next step is a pre-hearing conference with representatives of the parties (and occasionally their clients). It is helpful when advocates recognize that the arbitrator is essentially the "judge for all purposes" and comport themselves with civility to each other as well as the arbitrator.

Negotiated agreements, whether pre- or post-dispute and court mandates often are bare bones and require that the first order of business is to agree upon a set of procedural rules, such as the American Arbitration

⁴ Which can be found many places including the website of the American Arbitration Association, www.aaa.org.

⁵ My favorite was a prohibition on evidence from former employees, which the parties waived at my suggestion.

or JAMS Rules for employment disputes or ad hoc rules acceptable to both parties.

The next item on the agenda typically is what I think of as the "Discovery Dance", which may be simple or complex and may require a multitude of conference calls. If the parties are anxious for the process to fulfill the promise of arbitration being faster than court, it works to set a date for the hearing and work back for setting a discovery schedule. In many jurisdictions there may also be motions of various kinds, including Motions in Limine. While Motions for Summary Adjudication may be fairly readily granted regarding peripheral claims, it's far less likely (for a variety of reasons) that a Motion for Summary Judgment will be granted. At some point in the arbitration management process there are a multitude of what might be called technical decisions which have to be made over place(s) of hearing, whether there will be a court reporter, exchange of witness lists, subpoenas, and the handling of evidence.⁶

Before the hearing for employment cases and early in the hearing in labor cases, the arbitrator will also read the key statutes and/or contractual provisions relevant to the particular dispute. Case law may be reviewed at various times during the procedure as needed by the arbitrator. Arbitrators DO read cited cases (except, perhaps, those at the tail of a lengthy string cite) so it behooves counsel to accurately cite and make sure the case (not just the head-note) supports the proposition for which it is cited. It is an appreciated courtesy for the parties to supply the arbitrator with copies of the key cases, especially for arguments made during the hearing itself.

⁶ For example, if the parties are unable or unwilling to produce a joint set of exhibits, I require they opt for separate color binders and I always require that exhibits be tabbed.

Although the hearing runs pretty much the same in the arbitral forum as in others, it may be in a far more informal setting than court or some administrative agencies and, unless the parties have agreed otherwise, not to run in strict accordance with either state or federal rules of evidence. Parties and counsel must recognize that they bear responsibility for ensuring that what are intended as private conversations stay that way and to take time to check out who may be in hearing distance (even in the bathroom).

Final argument may be orally or in writing. When the record is closed (and please don't submit new material with your post-hearing brief), the hardest work of the arbitrator begins in making a decision and articulating the reasons for it. Unless there are compelling reasons not to do so, I always prepare a written reasoned decision. This may be aimed primarily at the employee, at his or her representative or for use by people down the line - but hopefully will speak to all with equal clarity. My personal practice is to write as concisely as is compatible with understanding as I have never wanted to try to reflect all the evidence introduced or treat any arguments which played no role in my decision-making, but this is an area where arbitral choice varies widely.

The basis of all decisions are the extent to which the credible facts support the position of the party which has the burden of proof. If the facts are sufficiently equal, the party with the burden loses.

"Facts" which are stipulated to are almost always accepted as facts for purposes of deciding the matter, even if the arbitrator has some doubt that they are true. "Facts" which are not disputed are likely to be accepted for purposes of the case, although also somewhat more likely to be queried if they are both crucial and the arbitrator believes they are not true. Credibility determinations are often the key to the

decision and can be excruciating to make. While other factors sometimes play an important role, the most common inquiry made by the arbitrator to the arbitrator is, "does it make sense in context?"

Once the facts have been marshaled, the arbitrator has to decide if the reliable facts in the case record support the claim(s). If the answer is "yes", the claimant wins. If the answer is "no", the claimant loses. Simple isn't it?