IN THE SUPREME COURT OF TEXAS

NO. 01-0774

J. M. DAVIDSON, INC.

v.

CHELSEY J. WEBSTER

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRTEENTH DISTRICT OF TEXAS

Argued on December 11, 2002

JUSTICE SMITH, dissenting.

I share the Court's view that the contract executed by the parties is far from a model of precise drafting, but I disagree that the phrase "any personnel policy" cannot be given a definite legal meaning. Like Justice Schneider, I believe that the arbitration policy falls within the ambit of the phrase "any personnel policy." However, I disagree with the portion of Justice Schneider's dissent that concludes the entire contract is unenforceable.

I would hold that the contractual provision allowing Davidson to "abolish or modify any personnel policy without prior notice" applies to the company's alternative dispute resolution policy, but that it does not waive Webster's right under Texas at-will employment law to contemporaneous notice of any change in Davidson's ADR policy. The rules of contract interpretation counsel against construing termination clauses as being retroactively exercisable and in favor of interpreting contracts to be valid. Because the relevant provision is properly construed as applying only prospectively to disputes arising after contemporaneous notice to

Webster of Davidson's decision to abolish or modify its ADR policy, it does not render illusory the parties' otherwise clearly enforceable arbitration agreement.

I

Whether an agreement imposes a duty on the parties to arbitrate a dispute is a matter of contract interpretation and a question of law for the court. *Tenet Healthcare Ltd. v. Cooper*, 960 S.W.2d 386, 388 (Tex. App.–Houston [14th Dist.] 1998, pet. dism'd w.o.j.). Similarly, whether a contract is ambiguous is itself a question of law. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462, 464 (Tex. 1998). We review questions of law de novo. *El Paso Natural Gas Co. v. Minco Oil & Gas, Inc.*, 8 S.W.3d 309, 312 (Tex. 1999). In a de novo review, no deference is accorded to the lower court decision. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998).

The one-page contract was the only evidence presented by the parties in the trial court. Accordingly, the only issues on appeal are the legal questions of whether the contract is ambiguous and illusory. I apply de novo review to both.

II

The contract states that Davidson "reserves the right to unilaterally abolish or modify any personnel policy without prior notice." The Court professes an inability to decipher whether the arbitration policy ratified by the contract is a "personnel policy" and, *sua sponte*, therefore concludes that the contract is ambiguous. However, uncertainty or lack of clarity is not enough to render a contract ambiguous. *Universal C.I.T. Credit Corp. v. Daniel*, 243 S.W.2d 154, 157 (Tex. 1951) ("It must be conceded that there is an absence of artistry in the grammatical construction and punctuation of paragraph 1 of the contract, but is its meaning when properly

read and interpreted so dubious as to subject the contract to the charge of ambiguity, thereby justifying the court in calling into play the rule of strong construction against the author of an instrument? We think not."); *Preston Ridge Fin. Servs. Corp. v. Tyler*, 796 S.W.2d 772, 777 (Tex. App.–Dallas 1990, writ denied); *Med. Towers, Ltd. v. St. Luke's Episcopal Hosp.*, 750 S.W.2d 820, 822 (Tex. App.–Houston [14th Dist.] 1988, writ denied).

Contractual provisions must be considered with reference to the entire instrument. *Myers v. Gulf Coast Minerals Mgmt. Corp.*, 361 S.W.2d 193, 196 (Tex. 1962). The main heading of the parties' contract reads "Alternative Dispute Resolution Policy" and the text below purports to determine the relationship between Davidson and its personnel. *See E.H.Perry & Co. v. Langbehn*, 252 S.W. 472, 474-75 (Tex. 1923) (title of an instrument, like every other portion of a contract, may be consulted in determining its meaning). In this context, we must give the phrase "any personnel policy" its natural and obvious import. *See, e.g., Pagel v. Pumphrey*, 204 S.W.2d 58, 64 (Tex. Civ. App.–San Antonio 1947, writ ref'd n.r.e.).

Applying the foregoing rules of construction, it is clear that the arbitration policy memorialized in the contract is a "personnel policy" and that the disputed provision unambiguously provides that Davidson has the right to abolish or modify its arbitration policy without prior notice. I simply cannot conclude that an arbitration policy that governs the conditions of employment for personnel is not encompassed by the phrase "any personnel policy," particularly when that phrase appears in a contract that is primarily devoted to setting forth an arbitration policy.

III

Justice Schneider asserts, and the Court implies, that if the disputed termination provision does apply to Davidson's arbitration policy, the contract is illusory. Because Davidson retained the ability to unilaterally abolish or modify its arbitration policy at any time, the argument goes, it assumed no obligation to Webster, and therefore Davidson's promise to arbitrate does not constitute consideration for Webster's reciprocal promise.[1] In my view, the provision's "without prior notice" language does not disclaim the requirement set forth in *Hathaway v. General Mills, Inc.*, 711 S.W.2d 227 (Tex. 1986) of contemporaneous notice for modifications to the at-will employment relationship. The provision is properly construed as applying only prospectively to disputes arising after contemporaneous notice to Webster of Davidson's decision to abolish or modify its ADR policy.

It is significant that the word "prior" precedes "notice" in the relevant provision. We must presume that each word in a contract has some significance and meaning. *Gates v. Asher*, 280 S.W.2d 247, 249 (Tex. 1955). For example, courts presume that words that follow one another are not intended to be redundant. *See Gulf Metals Indus., Inc. v. Chicago Ins. Co.*, 993 S.W.2d 800, 805 (Tex. App.–Austin 1999, pet. denied) (in construing the phrase "sudden and accidental," a temporal meaning was applied to "sudden" because "accidental" describes an unforeseen or unexpected event and ascribing the same meaning to "sudden" would render the terms redundant and violate the rule that each word in a contract be given effect.). Applying the

[1] However, there is no evidence that Davidson ever attempted to abolish or modify the arbitration agreement or that Webster ever harbored any doubt that he could compel arbitration for any dispute that arose, including the one before the Court.

foregoing Texas case law, we must presume that the parties in this case did not intend for the phrase "without prior notice" to mean without any notice.[2]

I have been unable to locate any Texas or federal case law specifically addressing whether the phrase "without prior notice" should be given the same meaning as "without notice."[3] However, an English appellate court concluded:

> A clause providing for termination of the scheme by the employer "without prior notice" means without notice in advance. Those words do not suggest that notice does not have to be given to effect termination of rights under the contract of employment. The clause puts the employee on warning that the scheme might not be permanent and that the employer reserves the right to terminate it without giving advance warning, but it does not mean that the employer's obligations can end without the employee being told.

Bainbridge v. Circuit Foil (UK) Ltd. [1997], Industrial Relations Law Reports (IRLR) 305 (Eng. C.A.). While authority authored on this side of the Atlantic is obviously preferable, an opinion issued by an English appellate court can surely be considered on a question such as the one presented here that does not involve interpretation of a statutory or constitutional provision, but rather interpretation of three basic English words contained in a private employment contract.

Consistent with the well-established rule that each word in a contract be given effect, the phrase "without prior notice" contained in the parties' contract should be interpreted to mean without notice in advance rather than without any notice. Therefore, the "without prior notice"

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[2] Neither the Court nor Justice Schneider attributes any meaning to "prior" and both repeatedly refer to the disputed provision as stating "without notice," thereby, *sub silentio*, writing the word "prior" out of the parties' contract.

[3] Justice Schneider argues that *Shumway v. Horizon Credit Corp.*, 801 S.W.2d 890 (Tex. 1991) and *Musgrave v. HCA Mideast, Ltd.*, 856 F.2d 690 (4th Cir. 1988) are "applicable precedent." ___ S.W.3d at ___. However, neither case is on point. In both *Shumway* and *Musgrave*, whether the phrase "without prior notice" should be given a different meaning from "without notice" was not at issue and, therefore, was neither addressed nor decided.

language does not disclaim the contemporaneous notice that is required by Texas common law to effect a change in the terms of an at-will employment relationship.[4]

In *Hathaway*, we held that the party asserting a change to an at-will employment contract "must prove two things: (1) notice of the change; and, (2) acceptance of the change." 711 S.W.2d at 229. We noted that "[t]o prove notice, an employer asserting a modification must prove that he unequivocally notified the employee of definite changes in employment terms." *Id.* We did not indicate when the notice had to be provided, thereby implying it could be given either in advance of or contemporaneous with the policy change.[5]

The *Hathaway* requirements are applicable here because the parties sought to modify their pre-existing at-will employment relationship to include binding arbitration. The contract, including the arbitration agreement therein, is incident to the at-will employment relationship between Davidson and Webster and refers to this relationship in several places. Therefore, if Davidson abolished or modified its arbitration policy, this would effect a change in the terms of the at-will employment relationship between it and Webster.

"Words of promise which by their terms make performance entirely optional with the 'promisor' do not constitute a promise." RESTATEMENT (SECOND) OF CONTRACTS § 77 cmt. a (1981). However, "[a] limitation on the promisor's freedom of choice need not be stated in

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[4] Another factor counseling in favor of interpreting the relevant provision as applying only prospectively without disclaiming Texas common law requiring contemporaneous notice is the use of the word "reserves." This word choice suggests that Davidson is memorializing a right that is consistent with its existing legal rights. "This word [reserves] means to keep or retain; that is to say, to keep what one already has. You do not reserve a right which you do not possess." *Baldwin v. Bd. of Tax-Roll Corrs.*, 331 P.2d 412, 414 (Okla. 1958).

[5] Justice Schneider argues that the relevant provision "contradict[s] the *Hathaway* requirements." ___ S.W.3d at ___. However, in *Hathaway* we required only notice, not advance notice.

words. It may be an implicit term of the promise, or it may be supplied by law." *Id*. cmt. d. The provision at issue here, while disclaiming advance notice, is consistent with *Hathaway*'s contemporaneous notice requirement and, as such, should not be read as an attempt to disclaim this implied, default legal prerequisite for modifying the conditions of an at-will employment relationship.[6]

Other courts have determined that when a contractual termination or modification provision does not state whether it applies prospectively or retroactively, the default interpretation should be prospective only, as this avoids nullifying the intent of the parties to form an agreement. *See Barker v. Ceridian Corp.*, 122 F.3d 628, 638 (8th Cir. 1997) (where retirement plan was silent regarding whether terms could be modified retroactively, prospective application favored because it avoids finding promise illusory); *Kemmerer v. ICI Ams., Inc.*, 70 F.3d 281, 287-88 (3d Cir. 1995).

Several other courts have adopted *Kemmerer's* rationale:

> The court's reasoning [in *Kemmerer*] can be captured in a simple illustration. If an employee is promised $10 per hour effective Monday, and told that her wage can be reduced at any time, and on Wednesday her wage is cut to $5 effective Thursday, her employer cannot refuse on pay day to give her $10 per hour for her work on Monday through Wednesday. Far from requiring that the employer express an explicit intent to pay $10 per hour for Monday through Wednesday's work notwithstanding the employer's freedom to reduce wages at any time, the Third Circuit held that what would have to be preserved explicitly would be an

[6] This case is distinguishable from the following cases cited in the Court's second footnote in which arbitration agreements were held to be illusory because the provision at issue allowed one party to terminate the agreement at any time without *any* notice. *Floss v. Ryan's Family Steak Houses, Inc.*, 211 F.3d 306, 315-16 (6th Cir. 2000) (arbitration agreement was "fatally indefinite" and illusory because employer reserved the right to alter applicable rules and procedures without any obligation to notify employee); *Gibson v. Neighborhood Health Clinics*, 121 F.3d 1126, 1133 (7th Cir. 1997) (Cudahy, J., concurring) (promise to arbitrate was illusory because employer retained the right to change or revoke the agreement "at any time and without notice.").

> employer's right to apply the reduced wage *retroactively* to Monday through Wednesday's work. A contrary rule would lack any basis in contract law . . . .

Abbott v. Schnader, Harrison, Segal & Lewis, LLP, 805 A.2d 547, 559 (Pa. Super. Ct. 2002) (quoting *Amatuzio v. Gandalf Sys. Corp.*, 994 F. Supp. 253, 266 (D.N.J. 1998)).

Indeed, Justice Schneider's dissent[7] and, if its second footnote is more than mere dicta, the Court's opinion, would render the entire at-will employment contract between Webster and Davidson illusory because Webster's rate of compensation and all other "personnel policies" would be subject to unilateral, retroactive change by Davidson. Certainly, this is not a reasonable interpretation.

Because the disputed provision did not expressly authorize Davidson to retroactively alter the arbitration agreement, I would follow the rule that, unless expressly stated otherwise, such provisions should be interpreted to apply only prospectively. Consequently, Davidson would be perpetually bound to arbitrate any dispute that arose prior to Davidson informing Webster of a change in its arbitration policy. As such, Davidson could not, after a dispute had arisen, let alone during the final stages of binding arbitration, implement a change in its arbitration policy that would be applicable to that dispute.

Finally, reading the contract as allowing Davidson to unilaterally abolish or modify the arbitration policy only prospectively with contemporaneous notice is supported by the long-standing rule that contracts should be construed in favor of validity. *See Wood Motor Co., Inc. v. Nebel*, 238 S.W.2d 181, 183 (Tex. 1951) ("It is elementary that if a contract is susceptible of

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[7] For example, Justice Schneider asserts: "Davidson's right to unilaterally abolish or modify *any* personnel policy without prior notice must be given its plain and ordinary meaning. Thus, the unilateral termination language must mean that Davidson can cancel or alter any personnel policy without informing Webster." ___ S.W.3d at ___.

two constructions, one of which would render it valid and the other void, the former will be adopted."); *Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979); *Lavaca Bay Autoworld v. Marshall Pontiac Buick Oldsmobile*, 103 S.W.3d 650, 657 (Tex. App.–Corpus Christi 2003, no pet.). Since the parties are presumed to know the law and intend their contract to have legal effect, their contract will be construed in view of this presumption. *Foard County v. Sandifer*, 151 S.W. 523, 524 (Tex. 1912); *Dewhurst v. Gulf Marine Inst. of Tech.*, 55 S.W.3d 91, 97 (Tex. App.–Corpus Christi 2001, pet. denied). We have specifically held that contracts should be construed in favor of mutuality. *Tex. Gas Utils. Co.* v. *Barrett*, 460 S.W.2d 409, 412 (Tex. 1970).

Under this prospective construction, whereby Davidson is free to alter its arbitration policy after giving contemporaneous notice only as to claims that had not yet arisen, it is clear that the contract is not illusory. Once the parties' contract is read as not disclaiming the contemporaneous notice requirement set forth in *Hathaway*, this case becomes indistinguishable from *In re Halliburton Co.*, 80 S.W.3d 566 (Tex. 2002) in which we held that a similar arbitration agreement was not illusory because the unilateral termination provision could be exercised only with notice.

IV

By binding itself to arbitration until it provides contemporaneous notice of a new dispute resolution policy that will apply only prospectively, Davidson has provided consideration to Webster, and the parties' contract is therefore not illusory. If the contract were interpreted as allowing Davidson to retroactively revoke the arbitration agreement without contemporaneous

notice, it would either be illusory or unconscionable, as Davidson could decide after a dispute arises whether it prefers to arbitrate or go to court. However, that is not this case.

Based on the foregoing, I conclude that the contract is neither ambiguous nor illusory, and therefore validly compels the parties to arbitrate their dispute. Accordingly, I respectfully dissent.

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Steven Wayne Smith
Justice

Opinion delivered: December 31, 2003