**RHODES UNIVERSITY**

**Document tabled with the Equity and Institutional Culture Committee meeting on 10 March 2014**

**Amendments to Employment Equity Act no 42 of 2013**

1. **Purpose**

The purpose of this document is to advise the Equity and Institutional Culture Committee of the amendments to the Employment Equity Act and its impact on Rhodes University’s employment equity practices and policies.

These amendments to the Act were passed 17 October 2013 and in terms of the Act must be implemented by 1 August 2014. For Rhodes University’s practices and policies, any changes that are required (a number of our practices are already compliant) will be implemented of August 2014.

1. **Definitions**

Principal act means the Employment Equity Act 55 of 1998 or the previous Act prior to these amendments.

1. **Amendments to the Act**

**3.1 Section 01, definitions**

“**Designated employer”** has now been amended to exclude the “local spheres of government”.

 “**Designated groups**” in the principal act, the act was limited to three categories of people, namely, black people, women and people with disabilities.

In the new amendments, the definition is now: people who are citizens of RSA by birth or descent or who became citizens of RSA by naturalisation before 27 April 1994 or who would have been entitled to acquire citizenship by naturalisation prior to that date but were precluded by apartheid policies.

Impact on Rhodes University: Rhodes University’s application for employment already addresses this. In addition, employment equity coding for the Human Resource Information System also takes this into account. Therefore this proclamation will have no impact on current practice.

**3.2 Section 06, prohibited grounds of discrimination**

There has been a new insertion of subsection (4) in the amendments. A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value, where this difference is directly or indirectly based on any one or more of the grounds listed in subsection (1) of the act, is unfair discrimination. The grounds listed in subsections 1 are, race, gender, sex, pregnancy, sexual orientation, family responsibility, religion, HIV status, conscience, belief, political opinion, culture, language, marital status, ethnic or social origin.

Impact on Rhodes University: Permanent staff doing the same work have the same terms and conditions of employment. No differentiation takes place on the basis of the grounds listed above. Contract staffs are on different terms to permanent staff but amongst contract staff doing the same work; they have the same terms and conditions of employment. The University to date has had no unfair discrimination disputes related to the grounds listed above. An allegation was made by the unions to the Portfolio Committee that black people are on contract while white people are permanently employed. This is not true i.e. there is direct discrimination in this regard i.e. the University does not make a deliberate decision to employ Black people on contract and White people on permanent terms. Contracts are used in particular contexts, irrespective of the race, gender etc. of staff. As such this new amendment will have no impact on current practice.

**3.3 Section 08, psychological testing**

The principal act indicated that psychological testing or other similar assessments should only be conducted only when “it has been scientifically shown to be valid and reliable” can be applied to all employees” and “is not biased against any employee or group”. .The amendment seeks to elaborate on this by stating that psychological testing and other similar assessments of an employee are prohibited unless the test or assessment being used has been certified by the Health Professional Council of South Africa (HPCSA) established by section 2 of the Health Professional Act or any other body which may be authorized in law to certify those test or assessment.

Impact on Rhodes University: At Rhodes, psychological testing is not conducted. A decision was taken a few years ago to not use any psychometrics. However, where psychometrics were previously used, all tests used were certified by the HPCSA. As such this amendment will not impact the University.

**3.4 Section 10, disputes**

With this amendment, the settlement of disputes now allows disputing parties to settle disputes of sexual harassment through arbitration at CCMA. Previously, a complainant had to upon failure of the conciliation process; refer their dispute to Labour Court for adjudication. Further, all employees may now settle their disputes through arbitrations at the CCMA. Previously, employees earning more than the determined threshold (as per Section 6 (3) of the BCEA) were not able to settle their disputes through arbitration at the CCMA. In terms of the principal act, unfair discrimination disputes would ordinarily be settled through conciliation mechanisms at CCMA, failing which, the parties were obliged to invoke the Labour Court adjudication processes. The provision to invoke the arbitration process at CCMA is therefore a positive development. While the arbitration mechanism has been made available, this avenue of dispute resolution is not an automatic course of action, the disputing parties must all agree to it. However, upon handing down of the CCMA award pertaining to disputes of unfair discrimination, if either the party affected by an award so wish to challenge the award through the Labour Court, such an application must be made with the Labour Court within 14 days of handing down the award. Furthermore, should the party applying for a review fail to comply with the 14 days prescription period, such party may apply for condonation of the matter with the Labour Court, and the Court may upon demonstration of valid reason of the degree of lateness, accept the application.

Impact on Rhodes University: This amendment makes legal recourse more accessible to staff. This could result in more CCMA referrals or processes taking longer at the CCMA, assuming that the institution is unable to resolve issues internally and/or matters are referred.

**3.5 Section 10, Burden of proof**

The principal act required that when a claim of unfair discrimination was made, that the employer, was required to establish that no unfair discrimination had taken place and that the employment practice or decision was fair.

In terms of the new amendments, in an event of a dispute of unfair discrimination, an employer is required to prove that, “*discrimination has not taken place*” and “*rationality of its decision and its fairness thereof*”. The employee on the other hand, will have to prove the “*irrationality of the employer’s conduct*” and “*that the employer’s conduct amounts to discrimination*” and “*the discrimination is unfair*”.

Impact on Rhodes University: The University has had disputes of unfair discrimination related to some of the listed grounds in Section 6 of the Act. This amendment requires action on the part of the employee which will not impact the institution. In the case of the employer showing “the rationality of its decisions and its fairness thereof”, the number of protocols and policies and procedural documents outline how procedures work and how decisions are taken. Provided the processes are followed (in terms of substantive issues) and decisions are taken in line with these, as an employer Rhodes will be able to easily justify the rationality of its decisions and the fairness thereof.

* 1. **Section 15, Affirmative Action** **measures**

“*Occupational categories*” a*s* per the principal act, representation of occupational categories has now been omitted from the principal act. As such, employers only have to report in terms of occupational levels of the designated employer in its workforce. This is an administrative issue and the Employment Equity Report required by the Department of Labour has in recent years, only asked for occupational level information.

Impact on Rhodes University: In terms of Rhodes’ employment equity plan, reporting is already done in terms of occupational levels.

**3.6. Section 20**

With regards to employment equity planning matters, the Director General of the Department of Labour now has got powers to obtain a Labour Court interdict, to impose a fine of **R1 500 000 - R2 700, 000** for non-compliance with the act, dependable on the pattern or level of non-compliance.

Impact on Rhodes University: Rhodes University is fully compliant with section 20, as such, it may be argued that the risks of being fined any penalty at this stage, are minimal. However, if future engagements with the Department of Labour are similar to those of the past, there is cause for concern. Past engagements have been characterised by a technical, quota approach to the achievement of targets without due consideration to the complexities of employing academic staff.

* 1. **Section 21**

According to the new amendment, the designated employer must submit its employment equity report to the Director General once every year on the “*first working day of October*”. However, if a designated employer fails to comply with the submission date, he/she must notify the Director General of the Department of Labour in writing at least before the last working day of August detailing valid reasons for its failure to comply with the deadline in question.

Impact on Rhodes University: The University’s employment equity reporting has always been submitted on time to the Director General of the Department of Labour, as such, the status quo must remain. With the utilisation of an online reporting facility, the dates of submission remains the 15 January each year.

* + 1. **Income differentials**

A designated employer when reporting in terms of sec 21 of the Act must submit, as prescribed, to the Employment Equity Commission established by section 59 of the BCEA, on the remuneration and benefits received in each occupational level of that that employer’s workforce. If there are substantial income differentials or unfair discrimination by virtue of difference in terms and conditions of employment of the designated employer, the designated employer must report on measures taken to reduce such differentials.

Impact on Rhodes University: It has already been noted that reporting of income differentials by occupational level is not meaningful for the institution. As a result, on an annual basis (presented at the last Employment Equity and Institutional Culture Committee meeting in 2013), an income differential analysis per grade and academic level was presented. This analysis has indicated that differentials for most grades and levels are not substantive and are well within acceptable norms. In addition, the draft remuneration policy, which is being negotiated between management and trade unions, drives a strategy to ensure fair discrimination in remuneration practices The remuneration practice of the institution at the present moment is to utilise a rand value strategy for annual adjustments to address historical inequalities. While the strategy has been accepted by NEHAWU for the last few years, this strategy is not without contention amongst the NTEU collective. Given these strategies, the above mentioned amendment on wage differential will not impact the institution as we already doing this work.

**3.6. Section 39 and 40, Appeals against non-compliance**

The principal act allowed for an appeals process against decisions of employer non-compliance. With the amendments, this has now been removed from the act. As such, once a non-complying designated employer has been interdicted to comply with the act or its provisions, such interdict becomes enforceable and there is no avenue to appeal against it in terms of the act. This presumably includes also the fines issued against non-compliance in terms of the schedule 01 of the act.

Impact to Rhodes University: The University has always been fully compliant with the submission of employment equity reports, as such, the Section above does not affect the University at the present moment. However, having no legal recourse in the event of a bad decision by the Department of Labour gives this authority inordinate power. In terms of administrative justice, this is very worrying.

Schedule 01

**(Maximum permissible fines that may be imposed against an employer for contravention of the act)**

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| *Previous Contravention*  | *Contravention of any provisions of sec 16 (read with 17) 19, 22,24,25 26 & 43(2) (proposed new fines)* | *Contravention of any provision of sec 20,21,23 & 44(b)* |
| No previous contravention  | **R 1500 000** | The greater of R1 500 000 or 2% of the employer’s turnover |
| A previous contravention in respect of the same provision  | **R 1 800 000** | The greater of R 1 800 000 or 4% of the employer turnover  |
| A previous contravention within the previous 12 months in respect of the same provision within three years period  | **R 2 100 000** | The greater of R 2 100 000 or 6% of the employer’s turnover  |
| Three previous contraventions in respect of the same provision within three years period  | **R 2 400 000**  | The greater of R 2 400 000 or 8% of the employer’s turnover  |
| Four years contraventions in respect of the same provision within three years period  | **R 2 700 000** | The greater of R2 700 000 or 10% of the employer’s turnover |