

## Memorandum

To: Rhodes University  
From: Bowmans  
Our Reference: Graham Damant  
Date: 6 October 2021  
Re: **RHODES UNIVERSITY - CHANGES TO TERMS AND CONDITIONS OF EMPLOYMENT IN RELATION TO PENSION FUND MEMBERSHIP**

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### 1. INTRODUCTION

- 1.1 We understand that the University intends closing new membership to the Rhodes University Pension Fund, a defined benefit retirement fund (the **Fund**) and requiring those employees who presently participate in the Fund to transfer their membership to a new defined contribution retirement fund (**New Fund**) (collectively, the **Proposal**).
- 1.2 We have been instructed to advise on whether or not the University's contracts of employment, among other documents, give employees a right to participate in the Fund as a term and condition of employment. Our advice is limited to the question posed.
- 1.3 In preparing our advice, we have been provided with and reviewed copies of the following documents (collectively, the **Documents**):
- 1.3.1 various template letters of employment for academic and support staff (the **letters of employment**);
  - 1.3.2 the conditions of service for permanent, full-time academic staff (the **conditions of service**);
  - 1.3.3 various letters of appointment for temporary teaching staff (internal and externally-funded) (the **letters of temporary appointment**);
  - 1.3.4 copies of the recognition and substantive agreements between the University and NEHAWU; and the University and NTEU (the **collective agreements**);
  - 1.3.5 the Fund rules and various amendments thereto (the **Rules** and the **amendments**, respectively);

### 2. DO THE EMPLOYEES HAVE A CONTRACTUAL RIGHT TO PARTICIPATE IN THE FUND?

- 2.1 It has been argued that the benefits provided through the vehicle of a pension fund are impliedly incorporated as parts of the benefits of employment and that a pension fund is merely the vehicle through which these benefits are provided to employees. This interpretation would mean that any proposed change to the underlying benefits such as, for example, the benefit that the Rules provide for, would need the agreement of the affected employees. This interpretation has not, however, found

traction with the South African courts or the courts in the United Kingdom, from which the South African courts take guidance on pension fund matters.

2.2 The South African courts have confirmed that a contractual right can exist by way of express or implied inclusion in a contract of employment, collective agreement, or by way of clear communication of an offer and acceptance between the employer and employee. The first point for consideration is accordingly whether or not any of the Documents give rise to a contractual right on the part of the employees to be members and remain members of the Fund.

2.3 The **letters of employment** contain the following provisions:<sup>1</sup>

2.3.1 The employees are bound to the terms of these contracts, and all University policies and provisions. It is recorded that the contracts constitute the entire agreement between the parties.

2.3.2 Clause 7 which deals with pension/provident fund provides as follows-

*"7.1 You shall be required to join a relevant Retirement Fund as determined by Rhodes University from time to time.*

*7.2 The retirement age and options for early retirement are in accordance with the rules and benefits of the Rhodes University Retirement Fund schemes.*

*7.3 The extent of your contribution to the fund may vary according to amendments to the rules of the fund by the trustees.*

*7.4 You will be advised of any change to the contribution rate.*

*7.5 For staff who are on a Total Cost to Company remuneration package, the total cost of the Rhodes Retirement Fund contribution will become a compulsory component of your remuneration package, and your cash component will be reduced accordingly.*

*7.6 For staff who are not on a Total Cost to Company remuneration package, the employer will contribute towards the Rhodes University Retirement Fund in addition to the cash component of your remuneration, as per the rules of the Rhodes University Retirement schemes."*  
(Underlining for emphasis).

2.3.3 Clause 15.3 of the contracts read with the annexed "Acceptance of Offer" provides, *inter alia*, that University-funded permanently employed staff members can elect to become a member of NEHAWU, the NTEU, not to become a member of any of the 2 recognised trade unions, or to register as a conscientious objector.

2.4 The **conditions of service** for full-time, permanent academic staff contain the following provisions:

2.4.1 The preamble to the document provides that "[a]ll appointments are subject to the Acts, Statutes and Regulations of the University, to Council's resolution for the time being in force, and to the

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<sup>1</sup> Being the template "Fixed-term contract for the long-term appointment of academics or non-citizens (for a period not exceeding 5 years)" and the template "Indefinite contract of employment for support staff and international staff".

following conditions of service which can be altered only with the consent of the staff member concerned and the University Council”.

- 2.4.2 Paragraph 3 which pertains to “pension and provident fund regulations” provides that “[m]embership of either the University’s Pension Fund or Provident Fund is compulsory, subject to any exceptions provided for in the regulations.”
- 2.4.3 Paragraph 4 which pertains to medical aid and group life insurance schemes similarly provides that “[m]embership of the University’s Medical Aid and Group Life Assurance Schemes is compulsory, subject to any exceptions provided for in the regulations.”
- 2.4.4 Paragraph 6 which pertains to retirement provides, *inter alia*, that “[t]he appointment of a staff member shall cease at the end of the year in which he/she reaches the age of 65 years: Provided that the University Council, in its sole discretion, may offer to extend the appointment of a staff member until the end of the year in which he/she reaches the age of 68 years; and Provided further that a staff member may elect to retire, after giving six calendar months written notice of his/her intention at any time after he/she reaches the minimum age for retirement as laid down in regulations pertaining to the University Pension Fund or Provident Fund referred to in paragraph 3 above.”
- 2.4.5 Paragraph 10 which pertains to rules and regulations of the University provides that “[t]he staff member shall take it upon his/herself to familiarise themselves with the policies and procedures of the University as found [sic] the institution website. Alternatively, the HR Division can be asked for copies of policies and procedures. The staff member shall undertake to abide by the rules and regulations of the University as articulated in the policies and procedures of the University or as communicated to him/her by senior officials of the University.”
- 2.5 The **letters of temporary appointment** for externally-funded positions provide that the employee will not be eligible for membership of the Rhodes University Pension Fund/Provident Fund or the Medical Aid Scheme.
- 2.6 On a consideration of the above, it is apparent that:
- 2.6.1 The letters of employment make membership of a pension or provident fund an express condition of employment. However, these documents do not contain any express or implied term entitling the employees to be and/or remain members of the Fund. What this means is that while permanent employees’ participation in a retirement fund is a condition of their employment, the type of fund to which they may be required to belong from time to time is subject to determination by the University. Accordingly, the type of retirement fund in which the employees participate, and the benefits afforded to them in terms thereof would be those as lawfully determined and/or amended by the trustees and the University, as the Main Employer, from time to time in accordance with the Rules.
- 2.6.2 The conditions of service also make membership of the University’s pension or provident fund compulsory. In this regard, neither “Pension Fund” nor “Provident Fund” is defined in the document. Should definitions of “Pension Fund” or “Provident Fund” exist elsewhere for purposes of the

conditions of service, please furnish us with further instructions thereon. In the absence of these terms being defined, then the conditions of service would only make membership of a retirement fund compulsory (i.e. a condition of employment) but, as with the letters of employment, the type of retirement fund to which employees belong would be subject to the determination of the University from time to time. The conditions of service further provide that its contents can only be altered with the consent of the staff member concerned and the University Council. In the present instance, and subject to our comment on the existence of a defined term for "Pension Fund" or "Provident Fund", consent would only be required where the University may contemplate changing the "compulsory" nature of employees' membership to a retirement fund. Accordingly, the type of retirement fund in which the employees participate, and the benefits afforded to them in terms thereof would be those as lawfully determined and/or amended by the trustees and the University, as the Main Employer, from time to time in accordance with the Rules.

2.6.3 Members of staff who are employed on a temporary or fixed-term basis are not eligible for membership of a retirement fund. As such, the scope of this memorandum is limited to those indefinite employees who are eligible to participate in a retirement fund.

2.7 The **collective agreements** provide as follows:

2.7.1 Recognition and Procedural Agreement between NEHAWU and the University concluded in August 2015

2.7.1.1 "Employee" means an employee of the University employed for an indefinite period, and on a full-time or part-time basis, excluding grades 18 to 25.

2.7.1.2 The Union is granted organisational rights and rights to consultation and collective bargaining on behalf of employees. The rights extended shall in no manner affect the right of the University to communicate and consult with employees or to recognise the rights of any other trade union provided this does not impinge on any rights accorded in terms of the agreement to the union and its members.

2.7.1.3 The University recognises the union as the collective bargaining representative of all of the union's members. It recognises the right of the union to represent, negotiate and conclude agreements on behalf of its members with regard to conditions of employment, and to discuss issues of mutual interest as agreed between the parties from time to time, subject to the union retaining a membership of at least 30% of eligible employees employed at the University.

2.7.1.4 The University agrees to extend collective bargaining rights to the union to represent its members in annual negotiations relating to salaries and other conditions of service for all permanent members of staff excluding grades 18 to 25 and any other matters agreed upon, provided it maintains membership of 30% of permanent employees excluding grades 18 to 25.

2.7.2 Recognition and Procedural Agreement between NTEU and the University concluded in November 2015

2.7.2.1 "Eligible Employee" means an employee of the University employed on an indefinite period on a full-time and part-time basis, excluding post grades 18 to 25 and who are excluded from the annual salary negotiations but which includes academic employees.

2.7.2.2 The University recognises the union and its right to represent its members who are employees of the employer in matters pertaining to their salaries, benefits and conditions of service. The union is accorded the right to recruit, organise, assist, and consult with and for and on behalf of, negotiate on behalf of, and represent the employees of the University who are signed-up associate members with general queries, disciplinary and grievance processes, and negotiations with the University.

2.7.2.3 The University recognises the union as the collective bargaining representative of all of the union's members with the right to represent, negotiate and conclude collective agreements on behalf of its members with regard to salaries, conditions of employment, and work environment in accordance with clause 10 of the agreement; and discuss issues of mutual interest to the parties as agreed from time-to-time, subject to the union retaining a membership of at least 25% plus one of Eligible Employees employed at the University.<sup>2</sup>

### 2.7.3 Substantive Agreement between the University, NEHAWU, and NTEU in January 2019

2.7.3.1 This agreement pertains to salaries and other conditions of employment for the period 1 January 2019 until 31 December 2019 and it only varies those terms and conditions specifically mentioned therein. The agreement does not make mention of or provision for any amendments to the University's pension or provident fund, or employees' entitlements thereto or participation therein.

2.7.3.2 On a consideration of the collective agreements, it is apparent that none of their provisions make express, tacit, or implied provision for employees' membership to the Fund. What the collective agreements do establish is that the unions have a right to represent their members in consultations and/or negotiations with the University pertaining to, *inter alia*, conditions of employment and matters of mutual interest, as applicable.

2.8 We note the following in respect of the **Rules** and the **amendments**:

2.8.1 "Main Employer" means Rhodes University (previously defined as the "Principal Employer");

2.8.2 "Rules" means "these Rules as amended from time to time";

2.8.3 Rule 10.5 deals with "Amendments to the Rules" and provides as follows-

*"(1) The Trustees may at any time amend the Rules by a majority of votes, provided that:*

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<sup>2</sup> Should the Union fall below the threshold, but remain representative of one more than 20% of all employees the words "consult" and "consultation" shall replace the words "negotiate" and "negotiation(s)". The Union will lose all organizational rights except the right to the deduction of trade union subscriptions if its representative percentage falls below the 20% threshold. The University may cancel the agreement if the verification procedure indicates that the Union has fallen below the 25% threshold, and it remains below 25% after one calendar month of the notice by the University that the Union has fallen below the threshold.

(a) *the rights and benefits of Members in respect of any Service prior to such amendment shall not be prejudiced thereby;*

(b) *the amendment is approved by the Main Employer;*

(c) *The amendment is not inconsistent with the provisions of the [Pension Funds] Act or of the Income Tax Act, 1962;*

*provided that the limitations in (a) and (b) above shall not apply to amendments required to ensure that the Fund will be able to meet its obligations in terms of a certificate issued by the Actuary; and provided further that any amendment to the Rules affecting the financial basis of the Fund shall be referred to the Actuary before being adopted.*

(2) *The Trustees shall submit any amendment to the Rules to the Registrar and the Commissioner in writing, for their approval.*

(3) *Within six months after the Fund Anniversary the principal officer shall notify the Members of all amendments to the Rules registered within that financial year.” (Underlining for emphasis).*

2.8.4 Amendment 9 to the Rules, which has not yet been approved by and registered with the FSCA, provides, *inter alia*, as follows:

*“B. With effect from 1 April 2007 the Rules of the Rhodes University Pension Fund shall be amended to reflect the current practice with regard to the election of member-elected trustees by replacing Rule 9.1(1) with the following:*

*9.1(1) The management, control and administration of the Fund vest in a Board of Trustees consisting of ten persons, five of whom shall be appointed by the Main Employer, of whom one must be Vice-Chancellor of the Main Employer or his duly nominated representative who will act as a Trustee in his stead, and five of whom shall be elected by the Members.*

*Of the five Member-elected Trustees, a minimum of one Member-elected Trustee shall be a Pensioner who is a retired Member of the Fund and the remaining Member-elected Trustees shall be determined by the election process; provided that the Member-elected Trustees must be either a Member of the Fund or a Pensioner who is a retired Member of the Fund. If the Members fail to elect Trustees for any reason, the Main Employer shall appoint the required number of Trustees; provided that such appointments shall not infringe upon the Member’s future right to elect Trustees.”*

2.8.5 Rule 10.9 deals with the “Dissolution of Fund” any provides, *inter alia*, as follows:

*“(1) The Fund may be dissolved:*

*(a) by the Trustees; or ...*

*(c) if the Employers decide unanimously that the Fund be dissolved, subject to six months’ notice to the Trustees and the Members; ...*

*(2) If the Fund is dissolved in terms of (1) above, the Trustees shall appoint a liquidator, subject to the approval of the Registrar. The following provisions shall apply:*

*(a) The liquidator shall allocate a portion of the assets of the Fund to the Pensioners on a basis determined by the Actuary and use each Pensioner's share in the assets of the Fund to purchase a Pension from an Insurer. The conditions determined in respect of such Pension are to be as similar to the Pensioner's Pension as possible.*

*(b) The balance of the assets of the Fund shall be divided by the liquidator in an equitable manner, as recommended by the Actuary, amongst the Members then participating in the Fund and shall be:*

*(i) invested in an Approved Pension Fund, Preservation Pension Fund, Approved Provident Fund or Approved Retirement Annuity Fund; or*

*(ii) to be paid to that Member in cash;*

*provided that investment in a Preservation Pension Fund is subject to the requirements of the Commissioner as specified from time to time.*

*(3) Alternatively, the liquidator may determine another method of disposing of the assets of the Fund for the benefit of the Members, Pensioners and Deferred Pensioners, subject to the approval of the Registrar and the Commissioner."*

*(4) Subject to the provisions of the Act and to the provisions of Rule 8.5, the liquidator shall decide in what manner the assets of the Fund shall be realized and, after consultation with the Actuary, in what manner the obligations and contingent obligations in respect of Members, Pensioners and Deferred Pensioners, shall be met. ...*

*(5) Any assets remaining in the Fund after the obligations referred to in (4) above have been met, shall, in his discretion, be divided by the liquidator amongst the Members, Pensioners and Deferred Pensioners in a just manner; provided that all Eligible Employees who either voluntarily or due to a reduction in or reorganisation of staff left Service during the immediately preceding twelve months or such shorter period as the liquidator may determine, shall for the purposes of this Rule be regarded as if they were Members on the date of dissolution of the Fund; and provided, further, that the benefits already paid to any such Eligible Employee before the division of the remaining assets, shall be taken into account in determining the amount payable to such person.*

*(6) If the Fund is terminated or dissolved under Section 28 of the Act [i.e. voluntary dissolution], all moneys remaining unclaimed for a period of six months from the date on which payment of benefits commenced after completion of all necessary formalities, shall be paid into the Guardian's Fund by the liquidator for the benefit of the Members concerned, and thereafter there shall be no claim against the Fund or the Employer. The liquidator shall indicate in his final liquidation account the amount thus paid and shall timeously furnish the Registrar with a certificate to the effect that all reasonable steps were taken to trace persons entitled to the amount. An auditor approved by the Registrar shall certify the account as correct."*

2.8.6 Rule 10(10) deals with the "Withdrawal of an Employer" from the Fund and provides as follows:

*"(1) Subject to the giving of three months' (or such shorter period as is accepted by the Trustees) notice by the Employer concerned to the Trustees and the Members employed by that Employer, an Employer may withdraw from the Fund in which case one of the following provisions shall apply:*

*(a) If after such withdrawal there is no Employer in terms of the Rules, the Fund shall be dissolved in accordance with Rule 10.9.*

*(b) If such Employer decides to establish a new fund or scheme or to participate in another fund or scheme for the purpose of providing retirement benefits for Eligible Employees who are members thereof, the provisions of Rule 10.12 shall apply in respect of such Employer.*

*(c) In all other instances the Members who are Employees of such Employer shall be entitled to their Members' Shares, as determined by the Actuary.*

*(2) With the approval of, or if requested by the Main Employer, the Trustees may request an Employer to withdraw from the Fund as from a date specified by them in which case the provisions of (1) above shall apply.*

*(3) If an Employer ceases to operate for any reason, such cessation will be deemed a withdrawal from the Fund by such Employer for the purposes of this Rule, in which even (1)© above will apply."* (Underlining for emphasis).

2.8.7 Rule 10.12 deals with the establishment of a "New Fund or Scheme" and provides as follows:

*"10.12 If the Employer decides to establish a new fund or scheme for the principal purpose of providing retirement benefits for his Employees or for certain of his Employees, or to participate in another fund or scheme for this purpose, the Trustees may, notwithstanding anything to the contrary in the Rules, apply the assets of the Fund or the appropriate portion thereof to obtain benefits for the Members and Deferred Pensioners concerned under the new fund or scheme, in such manner as the Trustees, after consultation with the Actuary and with the approval of the Registrar, may decide, subject to the provisions of Section 14 of the Act, and provided that adequate arrangements have been made in respect of all Pensions referred to in Rule 10.9(4)(a)."*

2.8.8 Rule 8.11 deals with the "Interpretation of Rules and Disputes" and provides as follows:

*"(1) The decision of the Trustees as to the meaning of or interpretation of these Rules or of any particular Rule or part of a Rule shall be final and binding on the Employers, Members and every person claiming to be entitled to a benefit under these Rules, subject to the provisions of Section 30A of the Act.*

*(2) Any questions which may arise with regard to a claim by any person under these Rules shall be decided by the Trustees, subject to the provisions of Section 30A of the Act."*

2.8.9 On a consideration of the above it is apparent that:

2.8.9.1 amendments to the Rules by the Trustees need to be approved by the University;

- 2.8.9.2 the Employers may unanimously decide to dissolve the Fund, subject to six months' notice to the Trustees and the Members which may be a mechanism by which the Proposal can be implemented;
- 2.8.9.3 an Employer may withdraw from the Fund in order to establish a new fund or scheme or to participate in another fund or scheme for the purpose of providing retirement benefits, subject to the giving of three months' (or such shorter period as is accepted by the Trustees) to the Trustees and the Members and subject to Rule 10.12. This again may be a mechanism by which the Proposal can be implemented.
- 2.9 In the light of what is set out above, and subject to our comment in paragraph 2.6.2 above, we are of the view that the employees do not have a contractual right to participate in the Fund and the Rules provide appropriate mechanisms by which the University can either seek to dissolve the Fund or withdraw from the Fund in order to participate in a New Fund. What this means is that the Proposal would not need to be negotiated and agreed upon between the University and the employees and/or their union, as applicable.



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Graham Damant  
Bowman Gilfillan Inc.  
6 October 2021