

Determinations Panel procedure

Procedure of the Determinations Panel, determined in accordance with section 93(3) of the Pensions Act 2004 (in particular, sections 93(3), 98 and 99(1))

Determinations Panel procedure

This is the procedure of the Determinations Panel, determined in accordance with section 93(3) of the Pensions Act 2004¹. In settling this procedure, the Determinations Panel has attempted to make it short and succinct and in particular, where there are relevant matters which are covered by the Pensions Act 2004, such as the content of warning or determination notices, statutory provisions have not been unnecessarily repeated.

Definitions and interpretation

1. Unless the context otherwise requires, the following expressions used in this document shall have the following meanings:
 - The Act – the Pensions Act 2004. Any reference to a section unless otherwise stated is to the relevant section of the Act
 - The regulator – The Pensions Regulator as established under section 1 of the Act
 - Determinations Panel – the Determinations Panel established under section 9 of the Act
 - Determinations Support – the team of the regulator which provides advice and administrative support to the Determinations Panel
 - Case Team – the team at the regulator which handles the case, including the preparation of the Warning Notice and presentation of the case to the Determinations Panel
 - Directly Affected Party – a person appearing to the Case Team, or to the Determinations Panel (as appropriate), to be directly affected by the regulatory action under consideration or by the determination
 - Parties – the Directly Affected Parties together with the regulator acting through the Case Team.
2. Any term used in this document which is defined for the purposes of any provision of Part 1 of the Act shall, unless the context otherwise requires, have the meaning used in the Act.

¹ See in particular section 93(3), 98 and 99(11)

The statutory framework

3. The Determinations Panel is established under section 9 of the Act. Its role, as set out in section 10 of the Act, is to determine whether to exercise certain regulatory functions of the regulator and if so determined, to exercise them.
4. The Determinations Panel must determine, under section 93 and section 99 of the Act, the procedure it will use for exercising its regulatory functions. Under sections 93(3) and 99(11) of the Act, the Determinations Panel has determined its procedure to be followed, as set out below. In carrying out its functions on behalf of the regulator, the Determinations Panel will ensure that its approach to decision-making is made on the basis of fairness between parties.
5. Under section 94 of the Act, the regulator must publish a statement of any procedure established under sections 93 and 99. This procedure will therefore be published on the regulator's website.

Special and standard procedure

6. The procedure set out below at paragraphs 8 to 11 is the standard procedure provided for in section 96 of the Act and is to be read in conjunction with any Case Team procedure published by the regulator relating to the standard procedure.
7. The special procedure set out at paragraphs 12 to 20 below, which will be used where section 97 of the Act applies, is to be read in conjunction with any Case Team procedure published by the regulator regarding the special procedure. The special procedure will be used where it is considered likely that:
 - i. if a Warning Notice were to be given, or where a Warning Notice is given and before the representations given can be considered, there would be an immediate risk to the interests of members under an occupational or personal pension scheme or to the assets of that scheme, and
 - ii. it is necessary to exercise the function immediately because there is, or the regulator considers it likely that if the function were not exercised immediately there would be, an immediate risk to the interests of members under an occupational or personal pension scheme or to the assets of that scheme, or
 - iii. where a Warning Notice has been given, and representations have been received and considered, there would be an immediate risk to the interests of members under an occupational or personal pension scheme or to the assets of that scheme if the function were not exercised immediately.

Standard procedure

Referral of cases by the Case Team to the Determinations Panel for determination

8. The Case Team will advise Determinations Support and the Directly Affected Parties if it decides to refer a matter to the Determinations Panel for a determination and will submit a request for the Determinations Panel to make the determination (a Request).
9. Once a Request has been submitted to the Determinations Panel, Determinations Support will write to the Case Team and the Directly Affected Parties to acknowledge receipt of the case on behalf of the Determinations Panel. Once a case has been referred to the Determinations Panel, all procedural issues will be decided by the Determinations Panel.
10. Upon receipt of a Request, the Determinations Panel will consider and set a timetable for progress of the matter, including consideration of whether to hold an oral or public hearing (see paragraphs 31 to 37 below.) The Determinations Panel may issue directions (and will in appropriate cases consult the Parties before doing so).
11. The papers presented to the Determinations Panel will be the Warning Notice and any representations made in respect of it (including any Response or Reply as provided for in the Case Team procedure). The Determinations Panel will expect:
 - i. the documentation received from the Case Team to set out fully the case that it is being asked to consider including the circumstances of the case and the grounds and evidence for the claims made, and
 - ii. any representations to contain all the submissions and supporting evidence relied on.

The Determinations Panel will only consider documentation if it has been served on or made available to all Parties. If, on a request for the appointment of an independent trustee, the Determinations Panel has been provided with tender documentation relating to the appointment of an independent trustee by the Determinations Panel, this tender documentation will not be circulated, or made available to, any Directly Affected Party.

Special procedure

12. The special procedure will follow the standard procedure so far as this is practicable. In accordance with section 97 of the Act, under the special procedure:
 - i. the Directly Affected Parties may not be given a Warning Notice or have the opportunity to make specific representations, or
 - ii. any representations may not be considered, or
 - iii. the standard procedure may not be followed to its conclusion before the Determinations Panel first decides the matter.
13. Where the Case Team considers that the special procedure should be followed it will provide Determinations Support with a 'Request for the Determinations Panel to exercise a Regulatory Function' (a Special Procedure Request). This is expected to explain why it is considered that the case falls within section 97(1) of the Act and will include all material for the Determinations Panel to consider.

14. If appropriate, the Determinations Panel may adjourn any special procedure hearing in order to obtain additional information or supporting evidence from the Case Team to justify the use of the special procedure. Such information or evidence will be requested and provided in writing.
15. Following a special procedure hearing, if appropriate, the Determinations Panel will issue a Determination Notice and any appropriate Orders. In cases where an independent trustee is appointed at a special procedure hearing and where necessary to protect the interests of members or the assets of a scheme, the Case Team and the independent trustee may be advised of the Order appointing the trustee in advance of the other Directly Affected Parties being notified.
16. In accordance with section 99 of the Act, a compulsory review will follow any determination made under the special procedure. As part of the compulsory review process, subject to paragraph 11, Determinations Support will send the Determination Notice and any papers placed before the Determinations Panel to the Parties.
17. Directions for the compulsory review will be issued to the Parties by, or on behalf of, the Determinations Panel having regard to the requirements of sections 98 and 99 of the Act. In particular, these directions will contain a suggested timetable for the service of any representations by the Parties, prior to the Panel making its determination on the compulsory review. All representations served should, where possible, be circulated by the Directly Affected Parties to all other parties.
18. The compulsory review will be carried out by the Determinations Panel, normally constituted in the same way as during the original determination, as soon as reasonably practicable.
19. When conducting a compulsory review of a decision made under the special procedure, the Determinations Panel will reconsider all the papers that it had at the original hearing and any representations received from the Parties in response to the Determination Notice, and any new information relevant to the application provided there is confirmation that this has been sent, which includes being sent by email, to all Parties and the Determinations Panel are satisfied that the Parties have had a reasonable opportunity to consider the information and respond to it.
20. Following the compulsory review, the Determinations Panel will issue a Final Notice and any appropriate Orders to the Parties.

Hearings of the Determinations Panel

21. Hearings of the Determinations Panel will normally be constituted with at least three members. Two members will be a quorum.
22. In cases where the special procedure applies, or in circumstances agreed to by the hearing chairman, the members may participate in a hearing by way of a telephone conference.
23. Any decision may be taken by a majority.
24. Hearings of the Determinations Panel where the hearing is on the paper evidence will normally be attended only by panel members, their clerk and Determinations Support staff (as appropriate).
25. At the stage of any hearing where the Determinations Panel considers and makes its decision, only panel members, the clerk and Determinations Support staff (as appropriate) will be present.

Decision-making

26. The Determinations Panel expects the Case Team to make the case by producing the evidence required by paragraph 11 or 13. The Determinations Panel will take no part in the investigation carried out by the Case Team. However, in order to ensure that its decision is made in a manner that is fair to all parties, including those persons whose interests the Determinations Panel is statute-bound to consider, and consistent with the regulator's public law duties, the Determinations Panel may:
 - i. consider additional material (to that required by paragraph 11 or 13 above) supplied by the Parties so long as it is submitted within a time period in which it can properly be considered by the Parties
 - ii. request the production of apparently existing material or information (ie material which, having considered the documentation provided, the Panel has reasonable grounds for concluding exists), and
 - iii. decide, in managing the process, that it may consider any additional material or information received from persons who are not Directly Affected Partiesprovided that the issue in relation to which material or information is received or requested is one that has already been raised by the Parties and which the Determinations Panel considers to be within the scope of the case made by the regulator.
27. Prior to making a determination, the Determinations Panel will review and decide which parties are directly affected by the determination.

Determinations

28. The standard of proof required will be on a balance of probabilities. The burden of proof will be on the Case Team, except where the matter has come before the Determinations Panel by an application made under or by virtue of any of the provisions listed in section 10(6) of the Act (in which case the burden of proof will be on the applicant). For avoidance of doubt, the burden of proof will remain on the Case Team in the event of a compulsory review pursuant to section 99 of the Act of a determination made under the special procedure provided for in section 98 of the Act.
29. When the Determinations Panel has made a decision it will issue a Determination Notice (or, in the case of a compulsory review, a Final Notice) and any appropriate Orders to the Parties. Reasons for the decision will be given in writing and, usually included in the Determination or Final Notice, but, if not, they will be issued separately as soon as reasonably practicable. The Determination or Final Notice will contain information about the right of a Directly Affected Party to make a reference to the Tax and Chancery Chamber of the Upper Tribunal and the other details required by the Act.

Withdrawal of request

30. Save for those cases referred to the Determinations Panel under paragraph 38 below, a Request may be withdrawn by the Case Team from the Determinations Panel at any time prior to a determination being reached (for example where the Case Team considers the use of the power may no longer be appropriate as a result of representations served or new evidence received or due to an appropriate resolution being reached between the Parties). The Case Team should send a letter of withdrawal to Determinations Support and to all Directly Affected Parties save that, if a Determinations Panel hearing is in progress, withdrawal of the Warning Notice may be made at the hearing. The effect of such withdrawal is that the Determinations Panel will take no further action in relation to matters covered by the Warning Notice. For the avoidance of doubt a case cannot be withdrawn when a decision has been made under the special procedure pending review under section 99 of the Act. Nothing in this paragraph will prevent the Case Team making representations as part of a section 99 compulsory review that the original determination should be varied or revoked.

Oral hearings

31. The Determinations Panel may decide to hold an oral hearing before making its determination. This may follow a request from any of the Parties or if the Determinations Panel thinks this is the appropriate way to proceed.
32. When considering whether there should be an oral hearing the Determinations Panel may seek the views of the Parties on the proposal. The Determinations Panel will have regard to the circumstances of the case, including, but not limited to, circumstances where:
 - i. the honesty, integrity, fitness or competence of a party is being questioned
 - ii. there are disputed facts or judgements which, in the opinion of the Determinations Panel, could not fairly be determined on documentation alone, or
 - iii. the Determinations Panel considers it appropriate to assist it in making a proper determination.
33. Where the Determinations Panel considers it appropriate to hold an oral hearing, the Determinations Panel shall give written notice of the time and place of the hearing to each of the Directly Affected Parties, which will, unless the circumstances require, be not less than 28 days from the date of the notice.
34. The Determinations Panel may conduct an oral hearing in such manner as it considers appropriate having regard to the issues before it and shall settle, if necessary by making directions, the details of the procedure to be followed. These will deal with the extent to which the Parties may call and question witnesses and the making of representations. The Parties may be legally represented at any oral hearing. In addition, the Determinations Panel will invite the submission of representations from those Parties not attending the oral hearing. The decision reached by the Determinations Panel at an oral hearing will take account of the Warning Notice, all documents served by the Parties on or in relation to it and everything that was in the papers before the Determinations Panel and all evidence given and representations made at the hearing.

Public hearings

35. If requested by any of the Parties, the Determinations Panel may decide to hold a public hearing before making its determination. Any request should make clear on what grounds it is said to be in the interests of the members of the scheme, or in the public interest, for a public hearing to be held.
36. The Determinations Panel shall not hold a public hearing unless it is satisfied that the public interest outweighs any detriment to any pension scheme, its members or the Directly Affected Parties (that may be caused by the disclosure of any information which relates to personal or financial circumstances, is commercially sensitive, or consists of information communicated or obtained in confidence).
37. Where the Determinations Panel considers it appropriate for a public hearing the Determinations Panel will, unless the circumstances require, give not less than 28 days written notice of the time and place for the hearing to the Parties. Paragraph 34 above will apply to any public hearing held.

Applications under section 10(2)(b) of the Act

38. If an application is made under section 10(2)(b) of the Act and referred to the Determinations Panel in accordance with the Case Team's procedure, Determinations Support and the Determinations Panel will follow the standard or special procedure set out above, as appropriate. In relation to any such application, the Case Team shall prepare a Warning Notice including a statement on the merits of the case. The applicant can withdraw the application before any determination is reached.

Irregularities

39. Where any procedural irregularity comes to the attention of the Determinations Panel, the Determinations Panel may give such directions as it thinks appropriate to cure or waive the irregularity before reaching its decision. The Determinations Panel must do this if it considers any person may have been materially prejudiced by the irregularity.
40. Clerical mistakes in any written statement of a decision or factual errors arising in such a document from an accidental slip or omission may be corrected by Determinations Support subject to the agreement of any panel member involved in the decision. A copy of any corrected statement of a decision will be circulated to the Parties.

Publication

41. The regulator's policy relating to the publication of Determinations Panel determination notices may be found at: www.tpr.gov.uk/-/media/thepensionsregulator/files/import/pdf/essential-guide-publish-information-cases

Communications

42. Determinations Support is responsible for administering this procedure on behalf of the Determinations Panel. Once a case has been referred to the Determinations Panel by the Case Team, Determinations Support shall be responsible for all procedural communications with the Parties to ensure the case is handled effectively in accordance with this procedure.

General

43. References in this document to the law that applies to Great Britain should be taken to include corresponding legislation in Northern Ireland.
44. This document sets out the procedure that the Determinations Panel expects to follow in the circumstances described. However, there may be occasions on which the Determinations Panel considers it is appropriate to depart from this procedure. In that event the Determinations Panel will provide as much notice of the procedure it is to apply as possible.
45. The Determinations Panel will review its procedure from time to time as necessary. It may make changes to its procedures from time to time. Reasonable notice shall be given of such changes.

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