

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

VCAT REFERENCE NO. H141/2015

CATCHWORDS

Equal Opportunity – exemption – exemption from prohibition on discrimination on the basis of age in the sport of judo – exemption granted so as to exclude those under the age of 17 in the year they seek to be awarded Dan (black belt)- *Equal Opportunity Act 2010* ss 89 and 90 – *Charter of Human Rights and Responsibilities Act 2006*

Equal Opportunity – indirect discrimination – finding that requirement of Judo Victoria Incorporated that to progress to the 6th Dan grade one must have obtained one's 3rd Dan grade with open contest points does not amount to prohibited discrimination – *Equal Opportunity Act 2010* s.9

APPLICANT	Judo Victoria Incorporated
INTERVENOR	Victorian Equal Opportunity and Human Rights Commission
WHERE HELD	Melbourne
BEFORE	Senior Member A. Coghlan
HEARING TYPE	Hearing
DATE OF HEARING	25 February 2016
DATE OF ORDER	8 April 2016
DATE OF WRITTEN REASONS	8 April 2016
CITATION	Judo Victoria Incorporated (Human Rights) [2016] VCAT 535

ORDER

1. The application for an exemption to exclude those under the age of 17 in the year they seek to be awarded Dan (black belt) grades is granted.
2. The application for an exemption for the requirement that to progress to the 6th Dan grade one must have obtained one's 3rd Dan grade with open contest points is dismissed as the Tribunal has found that this conduct does not amount to prohibited discrimination.

3. The principal registrar must, as soon as possible, cause the form attached to this order be published in the Government Gazette.

A.Coghlan
Senior Member

APPEARANCES:

Applicant:	Mr Rodney Cox, Secretary, Judo Victoria Incorporated
Intervener:	Ms Jennifer Jones, for the Victorian Equal Opportunity and Human Rights Commission

HUMAN RIGHTS LIST

EXEMPTION

APPLICATION NO H141/2015

The Victorian Civil and Administrative Tribunal has considered an application pursuant to section 89 of the Equal Opportunity Act 2010 (the Act) by Judo Victoria Incorporated (the applicant). The application for exemption is to enable the applicant to exclude those under the age of 17 in the year they seek to be awarded Dan (black belt) grades (the exempt conduct).

UPON READING the material filed in support of this application, and hearing from all the parties who made submissions, the Tribunal is satisfied that it is appropriate to grant an exemption from sections 71 and 107 of the Act to enable the applicant to engage in the exempt conduct.

The reasons for granting this exemption have been published and the Tribunal hereby grants exemption from the operation of sections 71 and 107 of the Act to enable the applicant to engage in the exempt conduct.

This exemption is to remain in force from the day on which notice of the exemption is published in the Government Gazette until 13 April 2021.

Dated this 14th day of April 2016

A. Coghlan
Senior Member

REASONS

The Application

1. In June 2015, Rodney Cox, Secretary of Judo Victoria Incorporated (Judo Victoria) lodged an application for an exemption under section 89 of the *Equal Opportunity Act 2010* (the Act).

2. The reasons for making the application were stated as follows:

I am the secretary of Judo Victoria Inc and authorised by the committee of Judo Victoria to make an application for exemption from the Equal Opportunity Act 2010 for Judo Inc. Judo Victoria Inc is a member of Judo Federation of Australia Inc, the association which controls the awarding of International Judo Federation recognised Dan grades in Australia.

The competitions referred to below are competitions organised and authorised by State members of the Judo Federation of Australia Inc, such as Judo Victoria Inc or other bodies recognised by the International Judo Federation.

A dan (black belt) grading in judo is awarded to a fighter to recognise that they have reached a particular level which is above that of lower graded players. A basic requirement is contest proficiency. For this reason dan grades are restricted to over 17 year olds and separate contests are held for males and females. A separate grading system is used for ages up to 17.

As success in competition is a pre-requisite for Dan grading, wins obtained in contests restricted to older age competitors are not considered, and a separate process involving knowledge of judo and/or demonstration skills is used. It is unclear to us that not recognising the wins in competitions restricted to older age competitors for the purpose of awarding dan grades is discriminatory. We are seeking an order that it is not, and that the procedure of requiring competition for the purposes of dan grade awards, be open to all ages over 17 and without other age restriction is not discriminatory.

3. Orders were made for Judo Victoria to advertise the exemption application, to enable anyone to make a submission about it.

4. Submissions were received from Mr Cox for Judo Victoria; Mr Neville Sharp, President of the Judo Federation of Australia, Inc.; Mr Peter White; Mr Boris Ansons and Ms Susan Moorshead, President of the Caulfield Judo Club.
5. The Victorian Equal Opportunity and Human Rights Commission (the Commission) was granted leave under section 159 of the Act to intervene and lodged extensive and very helpful submissions.
6. The hearing commenced on 9 December 2015 but was adjourned as not all those who made submissions had received notice of the hearing. The hearing resumed on 25 February 2016.
7. I heard from all those who had made submissions. At the hearing the practices and procedures of Judo Victoria that may have been discriminatory were clarified.

Legislative Framework

8. Sporting organisations having rules and procedures related to a person's age may amount to prohibited discrimination under the Act. Section 6 of the Act makes 'age' a protected attribute. Placing age restrictions on whether a person can participate in sporting activity, or having a condition or requirement in place that disadvantages persons of a particular age and which is not reasonable, thus restricting their access to a sporting activity, may breach s.71 of the Act. Section 107 of the Act prohibits requesting discriminatory information, such as someone's age.
9. To avoid breaching the Act, Judo Victoria has applied for an exemption from the provisions of the Act. S.89 gives the Tribunal power to grant an exemption from any of the provisions of the Act in relation to certain people or activities or in any other circumstances specified by the Tribunal, subject to any conditions the Tribunal thinks fit.
10. Section 90 of the Act sets out the factors the Tribunal must consider when deciding exemption applications. It provides:

In deciding whether to grant, renew or revoke an exemption, the Tribunal must consider-

- (a) whether the proposed exemption is unnecessary because-

- (i) an exception or exemption in this Act already applies to the conduct sought to be exempted; or
 - (ii) the conduct sought to be exempted would not amount to prohibited discrimination; and
 - (b) whether the proposed exemption is a reasonable limitation on the right to equality set out in the Charter of Human Rights and Responsibilities; and
 - (c) all the relevant circumstances of the case.
11. In exercising the exemption powers consistently with the purposes and objectives in the Act, the Tribunal must do so in accordance with the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (the Charter.)
 12. As a consequence of s.32 of the Charter, the Tribunal must interpret s.89, as far as it is possible to do, compatibly with human rights. The plain words of s.89 indicate that the purpose of the section is to empower the Tribunal to exercise a broad discretion to grant, renew or revoke exemptions from the provisions of the Act. The Tribunal may apply conditions to the exemption or determine its term. Section 90 requires that the Tribunal take into account the listed matters when exercising the discretion.
 13. Section 90(a) requires an assessment of whether the conduct would amount to prohibited discrimination or whether one of the general or specific exceptions contained in the Act applied to the conduct in issue, so that an exemption is not necessary. Section 90(b) directs the Tribunal to one of the human rights created by the Charter. As s.90(c) is open-ended, the Tribunal may also take into account any other human rights which arise in the circumstances. In this way the purpose of s.89 can be interpreted compatibly with human rights.
 14. In addition to considering the matters listed in section 90, under section 38(1) of the Charter, as a public authority, when making that decision, the Tribunal must not fail to give proper consideration to a relevant human right. The section 8 right to equality is considered as a mandatory consideration under section 90(b).
 15. When considering whether to grant an exemption it is also appropriate that the Tribunal have regard to the objectives of the Act. The onus of

establishing that it is appropriate to grant an exemption falls on an applicant.

The Judo Grading System

16. To understand the application, it is useful to set out the grading system for Judo. Mr Cox in his submissions provided the following summary:

The belt system is a distinctive feature of Judo. Judo is a hierarchical art, where seniority of judoka is designated by what is known as kyu-dan ranking system.

In Judo, improvement and understanding of the art is denoted by a system of ranks split into *kyu* and *dan* grades. These are indicated with various systems of coloured belts, with the black belt indicating a practitioner who has attained a certain level of competence.

Practitioners of Judo (*Judoka*) are ranked according to skill and knowledge of the art. Their rank is indicated by the colour of belt that they wear. There are two broad categories of rank: those who have attained a level of competency at which they are considered worthy of a *dan* grade and wear a black belt (*kuro obi*) and those who are yet to attain that level and who hold *kyu* grades. Those who hold *dan* grades are collectively termed *Yudansha* (literally ‘a person who has dan’) and those with *kyu* grades are *Mudansha*, literally ‘person without dan’.

This ranking system was introduced by Kano Jigoro, the founder of judo, in 1883 and was based on the ranking system in the board game called Go. Since then it has undergone considerable refinement and has been widely adopted by modern martial arts.

Promotion within the Junior grades is based on technical ability, knowledge and understanding, together with Japanese terminology and supplementary knowledge. There is no contest requirement but it is expected that the judoka follows a recommended randori and contest program as illustrated in the syllabus and has attained appropriate levels of achievement for each colour belt.

For senior kyu (apprentice), grades are ranked in descending numerical order. Beginners generally wear a white belt and pass through a series of colours while undergoing basic instruction. 1st kyu (brown belt) is the last kyu rank before

promotion to first degree black belt (shodan). There are 10 *dan* ranks, which are ranked in ascending numerical order.

Dan ranks are issued by the nation governing body (NGB) for Judo in each country and its affiliated organisations. The NGB is always the recognised governing body for Judo by that nation's Olympic committee. All national NGBs are members of continental unions – European Judo Union, African JU, JU Asia, Panamerican J Confederation and Oceania JU. These continental unions are all members of the International Judo federation, IFJ, which is recognised by the International Olympic Committee as the world governing body for Judo. As well as each countries' respective NGB and affiliates two other organisations issue dan ranks globally the IJF and the Kodokan.

In Australia, belt rankings for Seniors are, in ascending order: white, yellow, orange, green, blue, brown and finally black. Belt rankings for Juniors now start with a white belt and use 20 grades to achieve over times (as a junior) and a recommended progression rate of two grades per year: white, white-yellow, white-yellow with black tip, yellow, yellow with black tip, yellow-orange, yellow-orange with black tip, orange, orange with black tip, orange-green, orange-green with black tip, green, green with black tip, green-blue, green-blue with black tip, blue, blue with black tip, blue-brown, blue-brown with black tip, brown and brown with black tip. On becoming a senior (18 years old), the lower colour is retained as a kyu grade.

To attain a Dan grade, a judoka can enter an examination against other judoka of the same grade and, by demonstrating superiority over a cross-section of judoka at the same level, can win promotion to the next rank. Wins against judoka of the same grade or above in certain competitions may also count towards promotion. In this way, promotion through the Dan grades becomes increasingly difficult, since for each new grade the players will be of a higher standard. Judoka must also complete a competitive skills assessment that becomes progressively more demanding as they move through the Dan grades. However, a judoka may choose to follow a Technical Dan Grade pathway where they are examined on technical knowledge and understanding against a set criteria, higher than that for the contest route, and which also becomes progressively more difficult through the grades. There is a cut off at the 5th Dan grade (Godan) - to progress to the 6th Dan grade

(Rokudan) and beyond, the 3rd Dan grade (Sandán) must have been achieved under the competition pathway.

17. As I understand it, the most significant grading in Judo is for the black belt, which signifies that a person has achieved a high level of mastery. In Victoria and under the rules of the Judo Federation of Australia, to achieve a black belt you must turn 17 in the year you seek the Dan grading.
18. The material submitted by Mr Cox shows that the 1st Dan grade can be achieved by a combination of contest and knowledge, by a combination of service and knowledge and by knowledge alone, the latter involving a longer time frame.
19. Mr Sharpe's submission, which I accepted, pointed out that in judo there is no automatic progression to higher grades and that all grades are competency based. In Australia, he submitted there were only very small numbers of members awarded grades above 2nd and 3rd Dan. He submitted that the system is designed so that only the very best judo players can achieve very high or master grading.
20. Mr Sharpe submitted, consistently with Mr Cox's explanation, that:

To be awarded a black belt there are two pathways. The traditional and more common pathway is for players to enter competitions and win contests against other players at the same level to prove that they have achieved the right level of competency. This is followed by a technical exam to demonstrate their technical knowledge of all aspects of judo. A first Dan Black belt player can enter competitions and win contests against other players at the same level or better to demonstrate that they meet the competencies required for higher grades.

Not everyone can be a winner at competitions. The Judo grading system allows for players that are not champions at competition to get graded to Black belt through service to the sport and technical knowledge. They are expected to show high levels of technical skills. The progress of these gradings is slower than for those graded through the competition pathway. Members choosing this pathway can be graded to higher levels of Black Belt are not eligible for Master Grades of Sixth Dan and above.

Master grades in Judo are reserved for members who have demonstrated outstanding competition records during their competition careers. The International Judo Federation sets the rules for the highest levels of grading and for any Australian to be awarded a 7th or 8th Dan Black belt they must have won a medal at the world titles or at the Olympics.

21. Mr Cox's and Mr Sharpe's evidence clarified that competition points obtained in under 30 years of age contests, are counted as open contest points for Dan gradings, but that points obtained in veterans' or masters' competitions did not. They explained that the grading levels did not limit anyone from participating in the sport of judo, that there were no maximum ages for competing in State or National titles and that, while the official age for veterans or masters in judo is 30, there were members of the national team competing for Australia and at the Olympics up to nearly 40 years of age. In Australia, judo competitions are run for veterans or masters over the age of 30, with nine age sub-divisions across seven weight divisions for men and women.
22. It will be seen then, that the grading system allows anyone to access grades of up to the 5th Dan through the service and technical pathways. They are not required to have contest points to do so.
23. However, to progress to the sixth Dan, the rules are that you can only do so if you have obtained your 3rd Dan grading with open contest points. Points for Dan gradings are only allowed for those obtained at standard senior competitions, which include competitions for those under 30 years of age. Points obtained at masters' or veterans' competitions which are competitions especially for those over 30, do not count. However, there is no rule or condition that restricts anyone from participating in standard senior competitions, whatever their age. They are open to persons of any age.
24. Mr White and Mr Ansons are well into their 50s. They do not want to risk serious injury by competing at open competition with fitter younger men, which they would need to do to enable them to progress beyond the 5th Dan grade. They consider the grading system is stifling them. Whilst they can

and do compete in masters' competitions, they want points obtained in those competitions to be counted for the grading system.

25. Ms Moorshead also made submissions in support of a system that counts masters' tournament points towards promotion. She pointed out that each country has its own ranking system and its own promotion policies and criteria. As I understand it, she considers that counting masters or veterans tournament points for Dan grading would increase participation in the sport of judo generally.

Issues

26. It will be seen that there are two areas in the grading system which may involve breaches of the Act. They are:
- (a) the exclusion of those under the age of 17 in the year they seek to be awarded Dan (black belt) grades, and
 - (b) the requirement that to progress to the 6th Dan grade one must have obtained one's 3rd Dan grade with open contest points.

Exclusion of those under 17

27. The grading system for Judo Victoria provides that you must be 17 years in the year you seek to be awarded Dan (black belt) grades. This means that if you are under 17 years of age, you are excluded from seeking to be awarded Dan (black belt).
28. Section 71 of the Act states that a person must not discriminate against another person, relevantly for this case, by excluding the other person from participating in a sporting activity. 'Participating in a sporting activity' is defined to include coaching people involved in a sporting activity, umpiring or refereeing a sporting activity, and participating in the administration of a sporting activity. It is not limited then, to one's own physical participation in the sport, such as entering competitions.
29. Here, those under 17 years of age, where 'age' is a protected attribute under s.6 of the Act, are excluded from seeking to be awarded Dan (black belt).
30. I agree with the Commission's submission that placing a minimum age criterion on Dan gradings is shutting out those under the specified age from

taking part in the Dan grading, which may result in unfavourable treatment by preventing Judo practitioners from progressing to Dan ranks until the year they attain the age of 17. I am satisfied that treating them in this way amounts to discriminatory conduct under the Act.

31. On the face of it then, Judo Victoria would require an exemption from the provisions of the Act to continue to discriminate in this way, because s.13 of the Act provides that there is no breach if an exemption applies. There is also no breach if an exception under the Act applies.
32. Section 72 sets out exceptions for ‘competitive sporting activities’. Relevantly for this proceeding section 72(2)(b) permits restricting participation in a ‘competitive sporting activity’ to:
 - (b) people of a specified age group;
33. The Act distinguishes between ‘competitive sporting activity’ and ‘participating in a sporting activity’, with the exception only applying to the former. President McKenzie in *Robertson v Australian Ice Hockey Federation [1998] VADT 112* considered the predecessor of this exemption in s66(2) of the *Equal Opportunity Act 1995* (Vic). She found that ‘competitive sporting activity’ involved ‘contest between participants and the outcome normally involved the placing of participants in an order of excellence or priority’.
34. As set out in the submissions of Mr Cox and Mr Sharpe, which I accepted, progression in the Dan grading system can be achieved in a number of ways. It is not dependent on points gained by judo participants in contests which may rank them according to their skill or excellence. The evidence before me shows that it can be achieved through different pathways, other than by contest. Thus it seems to me that the exception for a ‘competitive sporting activity’ does not apply to a 17 year old seeking Dan grading.
35. As I am satisfied that the exception in s.72 does not apply here, it follows that Judo Victoria needs an exemption to enable them to continue to exclude those under the age of 17 in the year they seek to be awarded Dan (black belt) grades.

36. Having found that the conduct amounts to prohibited discrimination and that an exception in the Act does not apply, s.90 of the Act says that I must consider all the relevant circumstances and whether the requested exemption is a reasonable limitation on the right to equality set out in the Charter.
37. There is clearly a limitation of the right to equality, if an exemption were granted.
38. Following the approach in earlier decisions of the Tribunal, and considering the question of whether any limits on human rights are justified under s.7 of the Charter, in summary, the matters for consideration here include:
- a. The need to take into account the importance of human rights which are or may be engaged but noting they are not absolute and may be limited on reasonable grounds.
 - b. The purpose for which the exemption is sought and the importance of the resulting limitation of human rights.
 - c. The nature and extent of the limitation and the relationship between the limitation and its purpose.
 - d. Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.
39. It is important to recognise the right to equality. However, in this case I accept that there is a long and well thought out procedure for progressing to Dan grading.
40. I note that no person at the hearing opposed the granting of an exemption. Further, even though the application had been appropriately advertised, there were no written or oral submissions received opposing the granting of the exemption.
41. I am satisfied that the purpose of imposing an age requirement is justified. I am satisfied that at some point there needs to be a differentiation between junior and senior judo practitioners. I accept that the choice of 17 years of age in the year of Dan grading is sought, is reasonable.

42. In granting the exception, I am also mindful that the progression to a Dan grading does not limit a person's participation in the sport of judo which places importance not just on contests but on knowledge, skill, and contribution to the sport as a whole.

43. I therefore grant the exemption for a period of five years.

The requirement that to progress to the 6th Dan one must have obtained one's 3rd Dan with open contest points.

44. It will be recalled that contest points can be gained by anyone by participating in open competitions. There is no age limit on who can participate in open competition, so no person is being treated unfavourably because of their age, such as to found a case of direct discrimination under the Act.

45. Indirect discrimination occurs if a person imposes a requirement, condition or practice that has, or is likely to have the effect of disadvantaging persons with an attribute, and that is not reasonable.

46. In this case the condition or requirement identified fully during the hearing was that 'to progress to the 6th Dan grading, one must have obtained one's 3rd Dan grading, with open contest points'.

47. Neither Mr White, nor Mr Ansons can show they had obtained their 3rd Dan grading with open contest points. Whether they had or had not actually engaged in open contests for 3rd Dan grading was unclear to me. They pointed to the organisation's poor record keeping which they said made it impossible to now establish.

48. Nor did they make it clear during the hearing exactly what Dan level they held, but I understood neither had yet progressed to 5th Dan.

49. They feel they cannot safely compete in open competition, a choice they are entitled to make. However, the evidence was clear that they still have every opportunity to engage in the sport of judo and to compete in veterans' and masters' competitions.

50. The evidence, which I accepted, was that in Australia there are very few judo practitioners who hold the 6th Dan and above. I accept that those with these levels are the judo sporting elite.
51. In determining whether the requirement set out above is reasonable, s.9(3) of the Act states that this will depend on all the relevant circumstances of the case, including the following, relevant to this application:
- The nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;
 - Whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;
 - Whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the requirement, condition or practice but would result in less disadvantage.
52. The nature and extent of the disadvantage claimed is personal for Mr White and Mr Ansons. They have chosen because of their age, not to compete in open competitions, where they would be competing with younger fitter judo practitioners. They feel ‘stifled’ because as they see it, they are unable to fully progress through the Dan gradings. Yet they are still able to participate in the sport in a physical way through the masters’ and veterans’ competitions.
53. I am satisfied that changing the rules to allow for veterans’ or masters’ points to count for contest points would affect the integrity of the Dan grading system, disproportionate to the disadvantage claimed.
54. The Dan grading system already has a number of alternative pathways for progression which Mr White and Mr Ansons can still avail themselves of for further progression and they can still engage in Masters’ and Veterans’

contests. It is reasonable to preserve the elite sporting status of 6th Dan grade and above. It is reasonable that at some point there should be a requirement to have obtained a Dan grading with open contest points to progress further. To use points gained in Masters' and Veterans' contests would inevitably change the standard. It is difficult to see what further adjustments could be made at this stage, that would not affect the elite nature of 6th Dan grade and above.

55. In all the relevant circumstances of the case, and having had regard to the matters set out in s.9(1)(3) of the Act as they apply in this case, I am satisfied that the requirement set out above is reasonable, and that Judo Victoria is not in breach of the Act.

Senior Member. A Coghlan