

Recognition of experience during a period of absence due to disability (clauses 5-10.03 and 6-2.02)

1. Context

On October 23, 2018, the Court of Appeal issued a decision in which it ruled that the refusal to recognize experience for the purpose of advancement to a higher level for a person with a disability was discriminatory under the *Charter of Human Rights and Freedoms*. This decision ([2018 QCCA 1763](#))¹ by Quebec's highest court, while not directly addressing the provincial teachers' entente, highlighted the discriminatory nature of the provincial entente's provisions on this issue. It became inevitable that a change would have to be made in the next round of provincial collective negotiations.

In the meantime, QPAT has invited its affiliated unions to file preventive grievances in order to ensure that the rights of its teachers who are absent due to disability are protected. These grievances are the subject of an intersectorial agreement in which the employer party agrees to settle all of these grievances in order to recognize the experience of teachers on disability. No time limit as to the period covered by the grievances concerned by this settlement has been raised for the moment by the employer party, either at the provincial or local levels.

2. Content

Clause 5-10.03

The term "disability" means any incapacity resulting either from an illness, including a surgical procedure directly related to family planning, an absence due to an organ or bone marrow donation, an accident prescribed in Section D of this article or an absence prescribed in clause 5-13.26, which requires medical care and which renders the teacher totally incapable of performing his or her usual duties or the duties associated with any other similar position with comparable remuneration offered to him or her by the board.

A teacher who meets the definition in the preceding paragraph shall be entitled to the accumulation of experience during his or her absence.

Comments: The choice to place this addition in clause 5-10.03 allows for the coverage of any period of disability where the teacher meets the definition of disability provided for in this clause. Therefore, a period of disability that extends beyond the 104-week period of short-term salary insurance may also allow for the accumulation of experience.

Moreover, part-time teachers under contract who are absent due to disability shall also be entitled to the recognition of experience for any period during which

¹ *Procureure générale du Québec c. Association des juristes de l'État*, 2018 QCCA 1763.

they meet the definition of disability provided for in clause 5-10.03, despite the fact that clause 6-2.03 has not been amended

As a result, a teacher will be able to have all of his or her experience recognized as long as he or she meets the definition of disability provided for in clause 5-10.03.

Caution: Particular attention should be paid to teachers under contract by the lesson, casual supply and hourly rates, since these statuses are not directly affected by the application of clause 5-10.03. It may be appropriate to file grievances on this subject if the employer refuses to recognize experience during absences due to disability.

Clause 6-2.02

A school year during which a full-time teacher has taught or performed a pedagogical or educational function² for a minimum of 155 days³ in an educational institution in Québec recognized by the Ministère or in an educational institution under government authority outside Québec is recognized as a year of experience.

However, the school year during which a full-time teacher or a teacher under annual contract taught or performed a pedagogical or educational function² for a minimum of 90 days only because of circumstances beyond his or her control or because of a parental leave provided for in article 5-13.00 shall be recognized as a year of experience. Days of absence due to a disability, as defined in clause 5-10.03, and the days of leave prescribed in clauses 5-13.06, 5-13.07, 5-13.08, 5-13.09, 5-13.16, 5-13.22, 5-13.25, 5-13.26, 5-13.30, 5-13.31, 5-13.45, 5-13.46, 5-13.49 and those listed in the fourth paragraph of clause 5-13.69 for the duration stipulated therein are considered as days when the teacher teaches or performs a pedagogical or educational function².

Comments: In accordance with clause 5-10.03, an addition has been made to the clause concerning full-time teaching staff. This addition follows the same logic as that which currently exists for parental rights, where there is a repetition of the right to cumulative experience in both article 5-13.00 on parental rights and in clause 6-2.02. Otherwise, there is now the same "back and forth" for disability situations as there is for parental rights.

In practical terms, this change means that each day a teacher is absent on disability will be considered an actual day worked. This is what the wording "shall

² The term "pedagogical or educational function" means a pedagogical or educational function within the meaning of Regulation No. 9, as in force on June 30, 1989 (c. I-14, r. 9) (Appendix XI).

³ When a secondary-level teacher obtains a partial leave without salary which entails being released from one group of students only and that this leave alone does not allow him or her to accumulate the required 155 days, the board shall also recognize a year of experience for him or her.

#3

be considered as days of teaching or performing a pedagogical or educational function" means. Remember that these must be days of absence when the person meets the definition of disability in clause 5-10.03.

The absence of an amendment to clause 6-2.03 could mitigate the impact on teachers with precarious status (see the cautionary comment for clause 5-10.03).