Permanent incapacity, except if employee decides otherwise or if an excessive burden on employer, no longer triggers termination of contract

The obligation to accommodate the workplace for persons with a permanent incapacity has come to the fore with such incapacity no longer constituting an automatic termination-of-employment-contract event. Now, unless the employee intends otherwise, the employer has three months to make necessary adjustments or to offer a suitable vacant post, and a failure to do so that is not justified on the grounds of excessive burden means not only a breach of law with all its consequences, but also the continuation of the employer/employee relationship with all its consequences.

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1. The amendment

The amendment to the Workers' Statute Act concerning dismissals and permanent incapacities for work was called on, for some time, by different court rulings within the European Union. The legislator, however, has decided to introduce specific aspects that go beyond the obligations deriving from said court rulings when laying down a series of requirements for Spanish companies. It does so through Act 2/2025 of 29 April (Official Journal of Spain, 30 April 2025), which amends both the recast version of the Workers' Statute Act, approved by Royal Legislative Decree 2/2015 of 23 October, in matters of termination of the employment contract due to permanent incapacity of workers, and the recast version of the Social Se-

curity Act, approved by Royal Legislative Decree 8/2015,of 30 October, in matters of permanent incapacity.

The new law contains two articles, an additional provision and three final provisions. In the first article, three changes are introduced in the text of the Workers' Statute Act ('LET'). First, the amendment of Article 49(1)(e) to move the reference to the termination of the employment contract due to "severe disability or total or absolute permanent incapacity of the worker" to a new letter (n). Therefore, letter (e) of that sub-article will refer only to the "death of the worker" as a termination event. Second, to add, consequently, a new letter (n) to the aforementioned Article 49(1), which makes the possibility of termination of the contract due to a "declaration of severe incapacity, absolute or total permanent incapacity of the worker" conditional upon the worker's intention and the possibility of making reasonable adjustments. It should be noted that from now on, in both employment and social security legislation, the reference to "severe disability" is replaced by a reference to "severe incapacity". Moreover, this new point (n) makes explicit the way in which it can be determined, for the purposes of the exception provided for, whether the making of reasonable adjustments constitutes excessive burden for the undertaking. Lastly, the third change is the inclusion in Article 48(2) of the waiting period between the declaration of permanent incapacity and the adaptation or change of job as an event of suspension of the relationship, with the right to reinstatement.

The second of the provisions of the amendment modifies Article 174(5) of the recast version of the Social Security Act ('LGSS'), with the aim of adapting the dynamics of the extension of the monetary effects of temporary incapacity and the effectiveness of the benefits for total and absolute permanent incapacity or severe incapacity to the new situations derived from the amendment to Article 49 LET. And, for its part, the single additional provision refers to the terminological adaptation of the Workers' Statute Act, in the Social Security Act and in the Social Protection (Maritime-Fishing Sector Workers) Act, to adapt the denomination of "severe disability" and "non-contributory disability" to the recent amendment to Article 49 of the Spanish Constitution ('CE'). Lastly, the first, second and third final provisions contain, respectively, the legislative authority, the enabling legislation and the entry into force. By virtue of the second final provision, the Government must present, in the form of a bill, a proposal for a legislative amendment on the compatibility between work and permanent incapacity within six months, along the lines and recommendations of the Toledo Pact.

In this regard, it should be remembered that in February 2024, Article 49 CE was amended as the legislator considered that *"the original wording of Article 49 of the Spanish Constitution of 1978, which embodied the commitment of the constituent assembly to the rights and freedoms of persons with disabilities, needs to be updated in terms of its language and content to reflect the values that inspire the protection of this group, both nationally and internationally*". In order to achieve this adaptation, Article 49(1) CE states that *"Disabled persons exercise the rights provided for in this Title in conditions of real and effective freedom and equality. The special protection necessary for such exercise shall be regulated by law*". For its

part, Article 49(2) EC provides that "*The public authorities shall promote policies that guarantee the full personal autonomy and social inclusion of disabled persons, in universally accessible environments. Likewise, they shall encourage the participation of their organisations, under the terms established by law. Particular attention shall be paid to the specific needs of women and minors with disabilities*".

2. Reasonable adjustments or offer of a vacant post

This obligation is the key to the amendment. Because, if these adjustments are possible, the situation of permanent incapacity (in any of its degrees) becomes an event of suspension of the employment contract, as per Article 48(2) LET, with the right to reinstatement, during the time in which the reasonable adjustment or the change to a vacant and available post is made. And because, if such adjustments are possible, the employment contract will not be automatically terminated if the worker is declared permanently incapacitated (totally, absolutely or severely incapacitated)

Therefore, if it is not possible to make reasonable adjustments, the employment contract will be automatically terminated. But it will also be terminated, according to the new rule, when there is no vacant and available job, in line with the professional profile and compatible with the new situation of the worker or when, if such a possibility exists, the worker rejects the suitably proposed change of post. The question arises as to whether this is a choice of the employer - to adjust or offer a vacant post -, whether the choice is the worker's - to accept the adjustments or accept another post - or whether the legislator wanted to prioritise options - first adjust and after check for the existence of a vacancy -.

But all of this revolves around the intention of the worker, because it is the worker who must express his or her intention to continue the employer/employee relationship; because it will be the worker who, in the event of reasonable adjustments being made, will assess his or her capacity to adapt to this new adapted post - with the help of the prevention services and his or her representatives, where appropriate - and because it will be the worker who, in the event of the offer of a new post, must express whether he/she accepts or rejects it - subject to the condition that the post offered is a "suitable" one. Once the employee's intention has been settled, the key interpretative question is whether the employer has a choice between reasonable adjustments or, if possible, the offer of a vacant or available post. It would not make much sense to force the employer to make an effort to adjust a post when it can offer another - already adjusted and suitable - that remains vacant. Only if there is a discrepancy between the employer's and the employee's intention could the priority of the adjustments be assessed in relation to the vacant post which, in any case and in the absence of agreement, will be a dispute that can be tried in a court of law. In fact, when the legislator establishes a maximum period (three months) for the employer to adopt the appropriate measures from notice of the decision on permanent incapacity, it refers indistinctly to the carrying out of *"reasonable adjustments or the change of post"*

The only reason that would justify the non-adaptation of the post with reason-

able adjustments would be, according to the new Article 49(1)(n) LET, the impossibility of making such adjustments because it would constitute excessive burden for the company. And, in order to determine whether the burden is excessive, the legislator considers "particularly" the cost of the adaptation measures in relation to the size, financial resources, financial position and total turnover of the company. It will not be considered excessive if the burden is "sufficiently alleviated" by public measures, aid or subsidies.

Except in the case of companies employing fewer than twenty-five workers, in which case the new Article 49(1)(n) LET provides that the burden will be considered excessive when the cost of adapting the job, without taking into account the part that may be covered by public aid or subsidies, exceeds the greater of the following amounts: a) the compensation that would correspond to the worker by virtue of Article 56(1) LET - unfair dismissal and, therefore, thirty-three days' salary with a limit of twenty-four months' pay -; or b) six months' salary of the worker requesting the adaptation.

The "measurement" of the cost of adaptation is, as can be seen, different according to the size of the company's workforce, not by virtue of other factors. A frequent distinction in employment legislation that differentiates the application of legislation in micro, small, medium or large companies, but which, perhaps, in this case, is surprising in its quantitative dimension. Because if the legislator expressly admits that the "excessive burden" will depend, among other factors, on the "size" of the company, specifying a different measure according to the "size" of the company seems paradoxical. Moreover, the reference to "twenty-five" workers is used to a lesser extent in employment legislation (trial period, Article 14 LET), the term "fifty" workers being more common, thereby extending the obligations arising from the adaptation to companies with between twenty-five and fifty workers, which are exempt from other obligations, also because of their "size". It should also be pointed out that the identification of a quantitatively objective amount (compensation or six months' salary) monetarises a company's "obligation to do", encouraging the assessment of costs above these amounts in order to promote termination rather than adaptation.

Is it more appropriate not to quantify the cost? Probably not. And it will foreseeably lead to more court disputes. The new law already contains too many uncertainties; thus, considering "particularly" a series of measures - which means admitting many others that companies, basically those of a larger size, can put forward -, indicating the difference between "the financial resources, the financial position and the total turnover of the company" - a difference that is difficult to determine in many cases, in addition to the complex business plurality that can result from the grouping, decentralisation or internationalisation of the business reality -, establishing what is the "sufficient degree" that will allow the burden on the company to be alleviated by means of measures, aid or subsidies, and the "sufficient degree" that will allow the company's burden to be alleviated by means of measures, aid or subsidies; establish what is the "sufficient degree" that will allow the burden on the company to be alleviated by means of public measures, aid or subsidies - which do not exist today, at least as such, although others created indirectly for other purposes may be used.

3. Determination of the excessive burden of adaptation costs on the employer. An interpretative approach

In an interpretative approach and taking the international standard as a reference, it should be noted that the UN Convention on the Rights of Persons with Disabilities (2006) states that " *necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden* " should be provided, while *ILO Recommendation 168 (1983)* - which does not use the term "reasonable adjustments" but rather "appropriate measures" - states the need to include financial incentives to *"make reasonable adaptations to workplaces, job design, tools, machinery and work organisation*"; moreover, Council Directive 2000/78 of 27 November 2000 establishing a general framework for equal treatment in employment and occupation states how "[a]*ppropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources"* (recital 20).

In determining whether a disproportionate burden is involved, recital 21 of the above Council Directive indicates how account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance. As reasonable adjustments require individualisation, the measures may be very varied and different at different stages of the employment process, both in the selection process and during the course of the employer/employee relationship and even after the end of the same. Of course, a change of post may be considered an appropriate measure as reasonable adjustment for this purpose, bearing in mind that the reference in the Directive " *to the adaptation of 'the workplace' should be understood as meaning that that adaptation should be made as a matter of priority having regard to other measures which make it possible to adapt the working environment for the disabled person in order to enable him or her to participate fully and effectively in professional life on an equal basis with other workers. Those measures may include the implementation by the employer of measures which make it possible for that person to remain in employment, such as a reassignment to another position"* (CJEU Judgment of 10 February 2022, Case C-485/20, HR Rail, paragraph 41).

It should be noted that the main reference for this Council Directive, for the purposes of the concept at hand is the Americans with Disabilities Act of 1990 (ADA), one of the first laws to introduce the concept of "reasonable accommodation" for persons with disabilities. However, the ADA does not define reasonable accommodation, but merely requires the entity to prove that the accommodation would impose undue hardship on the operation of the entity's business. Among the possible accommodations ("reasonable accommodations" regulated in the employment subchapter) it contemplates are making existing facilities used by employees readily accessible to and usable by individuals with disabilities, as well as job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, training materials or policies,

the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities. Undue hardship thereunder will arise from an action requiring significant difficulty or expense, when considered in light of a number of factors to be considered including the nature and cost of the accommodation needed; the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities (as well as the number, type and location of its facilities); and the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce.

In our legal system, the concept is nothing new either. The Constitutional Court has already explained how a company's failure to make reasonable adjustments in the workplace when this does not entail a disproportionate or undue burden deprives measures such as dismissal or any other company disciplinary action by reason of the worker's inadequacy in the discharge of his or her duties of legitimacy (Constitutional Court Judgment no. 51/202). Well, the Disabled Person (Rights and Social Inclusion) Act (2013) provides in Article 40(2) that *"employers are required to adopt appropriate measures for the adaptation of the workplace and the accessibility of the company, according to the needs of each specific situation, in order to enable persons with disabilities to access employment, perform their work, progress professionally and access training, unless such measures place an excessive burden on the employer. In determining whether a burden is excessive, account shall be taken of whether it is sufficiently alleviated by public measures, aid or subsidies for people with disabilities, of the financial and other costs of the measures and of the size and total turnover of the organisation or undertaking".* To this end, it describes reasonable adjustments in Article 2(m) as *"necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities that do not impose a disproportionate or undue burden, where needed in a particular case in an effective and practical manner, to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all rights"*. Furthermore, Article 66(2) of the Act requires that in order for the adjustments to qualify as reasonable, *"the costs of the measure, the discriminatory effects of non-adoption on persons with disabilities, the structure and characteristics of the person, entity or organisation that is to implement it, and the possibility of obtaining official funding or any other assistance"* must be taken into account. This wording is not quite in line with the full obligation that seems to be deduced from the above-mentioned Article 40(2).

It should also be noted that in national legislation, the Occupational Hazard Prevention Act (1995), in Article 15, refers to the need for reasonable adjustments. In principle, the employer may adopt surveillance and scrutiny measures as a mechanism for the fulfilment of the obligation owed by the worker. In the case of the disabled person, he/she must know what his/her

real capacity for work is. In this sense, it may be the case that the worker does not disclose his disability - unless the latter is patent - for fear of being undervalued in his or her job, or even for risk of losing his or her job. It is true that Article 22(1) of this act imposes on the employer the obligation to periodically monitor the state of health of workers according to the risks inherent in the job. Finally, and without being exhaustive, the obligation to make adjustments is present in Article 34(8) LET when faced with work-life balance questions or in relation to remote work in Article 4(3) of Act 10/2021, of 9 July (Official Journal of Spain, 10 July).

However, and despite these legislative references, the question arises as to whether the changes introduced by Act 15/2022 of 12 July (Official Journal of Spain, 13 July), integral for equal treatment and non-discrimination, by also regulating reasonable adjustments as a cause of direct discrimination, means a higher level of enforceability with respect to that which already existed previously. Indeed. Article 4(1) of Act 15/2022 lists the violations of the right to equality and among them expressly recognises the refusal of reasonable adjustments, which may allow us to consider that the refusal to make reasonable adjustments is covered under any of the grounds of discrimination set out in Article 2(1). However, it should be noted that after, in Article 6(1)(a), when specifying what is meant by direct discrimination, states in its second paragraph that *"the denial of reasonable adjustments to persons with disabilities shall be deemed to be direct discrimination"* and then defines what is considered "reasonable adjustments", as it does for the other violations of the right to equality (direct or indirect discrimination, by association and by mistake, multiple or intersectoral, harassment, inducement, order or instruction to discriminate, reprisals, failure to comply with positive action measures). In this regard, Article 6(2)(a) states that reasonable adjustments means *"necessary and appropriate modifications and adaptations of the physical, social and attitudinal environment to the specific needs of persons with disabilities that do not impose a disproportionate or undue burden, where needed in a particular case in an effective and practical manner, to facilitate accessibility and participation and to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all rights*".

All of this background is worthy of consideration in the interpretation and application of the new legislation.

4. Time limits for the employee (expression of his or her intention to maintain the employer/employee relationship) and for the employer (making adjustments or offering a vacancy or termination of the contract).

The company has a maximum period of three months from the date on which it is notified of the decision classifying the permanent incapacity to make reasonable adjustments or change the post. When the adjustment entails an excessive burden or there is no vacancy, the company shall have the same period of time to proceed to terminate the contract. The decision must be reasoned and communicated in writing to the employee.

The legislator superimposes the deadline for adapting the necessary measures with the deadline for termination. A risky legislative option because it seems to invite the acceleration of the justification of the

impossibility of making adjustments or providing a new post in order to anticipate the termination. An incentive that makes no sense because, in the process of adaptation, the company bears no cost whatsoever since the public service provided to the worker continues to be maintained and, for the latter, it would certainly be more profitable to maintain the employer/employee relationship than to suspend it, but it is a decision in which he/she has no power to intervene. Only the payment of a higher or lower compensation for the termination of the contract could be an incentive to speed up the process of adaptation or the offer of a new position by the company. With a risk. And that is that haste may condemn the result and the whole process may have to be rolled back, by judicial imposition.

To this end, it should be pointed out that the new legislation stipulates that, for the termination of the employment contract provided for in Article 49(1)(n) LET, the procedure must be urgent and preferential treatment will be given.

Unlike the employer, the employee only has a period of ten calendar days from the date of notification of the decision classifying the permanent incapacity in the degrees provided for in the legislation (i.e. total, absolute or severe incapacity) to express in writing to the company his or her intention to continue the employer/employee relationship.

It is not confirmed that the decision must be final, so it must be interpreted that it is the decision that generates access to a permanent incapacity benefit, regardless of whether the decision is the subject of a claim or not. The same applies to the employer's obligation which, in principle, should arise as soon as this first decision is known, irrespective of its possible judicial derivation.

In any case, if the worker chooses to maintain the employer/employee relationship, the prevention services shall determine, in accordance with the provisions of the applicable legislation and after consultation with the workers' representatives on occupational hazard prevention, the scope and characteristics of the adjustment measures, including those relating to training, information and monitoring of the worker's health, and shall identify the jobs that are compatible with the worker's new situation.

5. On the permanent incapacity benefit

In accordance with the new Article 174(5) LGSS, in those cases in which, as a consequence of the application of the provisions of Article 49(1)(n) LET, the declaration of permanent incapacity in the degrees of total, absolute or severe incapacity does not determine the termination of the employer/employee relationship, because the company has carried out the reasonable, necessary and appropriate adaptation of the position to the new situation of declared incapacity or because the employee has been assigned to another position, the permanent incapacity benefit will be suspended during the performance of the same job with adaptations or another job that is incompatible with the receipt of the relevant benefit, in accordance with Article 198 LGSS.

Apart from the terminological or procedural issues already mentioned and which are the result of the content of the additional or final provisions of this new legislation, the amendment brings Social

Security legislation into line with the new employment legislation, establishing the consequences that both establish on the employer/employee relationship and, where applicable, on the Social Security benefit. Some questions remain to be resolved which could arise in practice, such as, for example and among others, the juxtaposition of this amendment with the transformation of permanent incapacity into a retirement pension -only for nominative purposes- and the application of a legal system of compatibility between pension and work both in retirement and, now even more so, in the case of permanent incapacity. In any case, all the difficulties described are inherent to any amendment and should not tarnish the scope and importance of this amendment to the Workers' Statute Act.