Key points on 'reasonable adjustments' due to worker incapacity

The rules on reasonable adjustments or the filling of a vacancy as an alternative to automatic termination of contract due to an employee's permanent incapacity leave some doubts that hinder application: concepts, calculations, aid, deadlines, etc., require at least some clarification.

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Although the obligation to make reasonable adjustments was already in our legal system, it is with the passage of Act 2/2025 of 29 April[1] (Official Journal of Spain of 30 April) that the exclusion of permanent incapacity as an automatic source of termination of the employment contract is being pushed.

Analysing the new Article 49(1)(*n*) of the Workers' Statute Act (LET), incorporated into the legal system by the aforementioned Act 2/2025, the following aspects should be noted, tentatively, for the purposes of interpretative guidance and pending regulatory or judicial developments.

1. *The 'declaration of severe incapacity, permanent absolute or total incapacity of the worker' that triggers termination*

Obviously, in order for this ground for termination to apply, there must be a prior

[1] Workers' Statute (Recast) Act Amendment (Termination of Employment Contracts due to Permanent Incapacity of Workers) and Social Security (Recast) Act Amendment (Permanent Incapacity) Act 2/2025 of 29 April.

declaration of the worker's permanent incapacity. The legislator does not refer to the notice of the decision in this regard until it mentions the time limits that both the employee and the employer have to communicate and/or make reasonable adjustments, but, logically, this whole process will begin with the notice of the administrative decision. However, the term *declaration* does not contain the characterisation of *provisional* or *definitive*, and it would appear that the latter should be used. However, it could happen that the aforementioned notice is appealed by the beneficiary, because they consider that it requires a higher degree, because they disagree with the amount, etc. If such an appeal is lodged — a preliminary appeal that may be lodged within thirty days, pursuant to Article 71 of Employment Jurisdiction Act, with the public authorities having forty-five days to respond and whose silence shall be deemed a rejection — it would have to be understood that there is no "declaration of incapacity" as such, since the legislator assumes that such a declaration is already final, not provisional. Otherwise, it would not make sense to require the employer to use all efforts necessary to search for alternative employment within the company as provided for in the new provision if the decision is provisional and subject to modification. It could be argued, however, that since this is already an acknowledgment of permanent incapacity, even if the beneficiary disagrees with the degree, the effects in the workplace would be the same. But this is not true. The employer will not have the same obligations in the case of total, absolute or severe incapacity.

Furthermore, until the Government puts forward, within the six months prescribed by final provision 3(2) of Act 2/2025 and "within the framework of social dialogue", a proposal to amend the rules on permanent incapacity and its compatibility with work, it should be noted that this provision is only applicable to permanent total incapacity, since absolute and severe incapacity are incompatible with any work requiring registration with Spain's Social Security (national insurance), in accordance with the Supreme Court judgment of 11 April 2024, Jur. 120553. This does not appear to have been a priority issue in the agreement signed with the employers' organisations and trade unions on 31 July 2024, which gave rise to other changes already introduced on compatibility, for example, with retirement pensions. However, this does not mean that measures cannot be adopted in this regard in the near future, in principle before the end of the current year. It is true that in this period in which the amendments are already applicable from 1 May 2025 and until these compatibility measures are adopted, and taking into account the final and conclusive decision of the Supreme Court on the incompatibility of permanent abso-

The declaration of incapacity that initiates the regime contained in Article 49(1)(n) of the Workers' Statute Act must be final and conclusive, and unappealable

lute and severe incapacity to work, those situations that arise during this interim period will be adversely affected by the lack of government action, unless remedied by the transitory nature of future legislation.

2. *Termination shall occur "when it is not possible to make reasonable adjustments because they would constitute an excessive burden on the company, when there is no vacant and available job that matches the professional profile and is compatible with the employee's new situation, or when, if such a possibility exists, the employee rejects the change of job that has been suitably proposed".*

   The wording of the provision suggests that there is an order of preference between its elements, all of which are conditions for termination. In other words, first, reasonable adjustments must be considered and it must be verified whether they constitute an excessive burden so that they do not have to be made. Next, it must be considered whether there is a vacant and available position compatible with the professional profile and the new situation. That position — it is understood — would not be the same as the one previously held, as it would not be suitable, by virtue of the above, for the new situation or profile, and would therefore be a different one, vacant and available (i.e. not reserved for any employee who had already applied to join the company), compatible with the professional profile and the new situation (more with the new situation than with the professional profile, since, otherwise, if a position compatible with the profile but unsuitable for the employee's new situation is offered, this could lead to a deterioration in their health, which is contrary to the objective pursued by the legislator and which aims to include the employee without objective risks). In any case, the employee should accept the change of position if it is "suitably" proposed.

   However, this provision raises numerous questions, as this order of preference is not so clear. It seems that these are alternative options, not cumulative ones. In other words, the employer could offer either the adaptation of the position previously held by the employee or a new vacant position according to the employer's preferences, as European courts have established that the creation of a new job is not a requisite. This makes sense because, ultimately, the employer knows its production organisation and thus complies with its legal obligation. It is true that, if the aim is to keep the worker in employment, the employer should review both possibilities and assess whether one, the other or both are 'suitable' for the worker.

   Furthermore, at no point does the rule require that the working conditions, salary or both be maintained outside the new position assigned, which must also be adapted to the employee's new duties, with the professional group being the general limit. However, there is nothing to prevent the maintenance of working conditions or wages if this is established unilaterally by the employer, bilaterally by the employee and the employer or collectively in an agreement or collective agreement of this nature. This is not a case of functional mobility because the legal regime governing the latter is unrelated and different from that of this provision, which was designed, envisaged and created with a different objective in mind.

In any case, the employer's offer to the employee must be 'suitable', because otherwise the employee may reject it. This makes sense, as the employer could offer something that the employee could not accept. But if the employee rejects the offer, must the employer continue to offer new positions or try other adjustments? Without prejudice to this possibility and nothing preventing the employer from continuing to try, as noted above, this does not seem to be the meaning of the rule that creates a new procedural modality in Article 120(2) of the Employment Jurisdiction Act (final provision 1 of Act 2/2025) so that, in the event of a discrepancy, either party may resort to this urgent and preferential procedure.

Not all public aid counts for the purposes of determining the excessive burden on the employer, only that expressly intended for this purpose

However, nothing prevents a vacancy from arising, after the contract has terminated, compatible with the permanent incapacity. In this case, a new employer-employee relationship could be established, since this regime does not involve a suspension with reservation of the job, but rather determines the termination of the contract without reservation.

Since the concept of *reasonable adjustments* has a long history in European legislation and a broad track record in our legal system, the types of measures that can be adopted as alternatives to termination are very different in nature. The European Union publishes guidelines and protocols for their implementation, which indicate many a possibility other than termination of contract (functional or geographical mobility, substantial amendment, flexibility of working hours, working time, salary, conversion to part-time work, teleworking, as well as technical, motor or physical adaptations in the workplace).

3. *On the 'excessive burden' that this obligation places on the employer*

The legislation establishes two different systems for measuring excessive burden: one for companies with fewer than twenty-five employees (based on the ratio of severance pay or six months' salary) and another for all other companies. Particular account shall be taken of the cost of the adaptation measures in relation to the size, financial resources, financial position and total turnover of the company. The burden shall not be considered excessive if it is sufficiently alleviated by public measures, aid or subsidies.

In the case of smaller companies, an objective criterion seems to be accepted, the provision clarifying that the higher of the two possible options (severance pay or six months' salary of the employee requesting the adaptation) shall be calculated "without taking into account the part that may be covered by public aid or subsidies". However, for other companies, it will not

be easy to meet the criteria (which do not appear to be cumulative but rather alternative), as size, resources, financial position and turnover are extremely diverse, given that a company may be small but have a high turnover, or vice versa. Furthermore, it is not clear whether, in complex business situations (e.g. groups of companies), the measurement should be made in relation to the group or in relation to the company, nor whether, in such cases, the alternatives offered to the employee must be implemented in the company to which such belongs or may be implemented in any of the companies making up the group. Of course, there are already case law criteria in other areas, such as collective dismissal, which could serve as a reference for resolving any doubts in this regard, but this is a very different regime that deserves specific attention due to its particular scope, which is also subsequent, but with a real or potential possibility of maintaining employment.

However, particular attention should be paid to the fact that the burden is not considered excessive when it is understood to be *alleviated* by public aid. In accordance with what has been stated in the case of companies with fewer than twenty-five employees and in view of the meaning of the term *alleviated*, it must be understood that this aid will reduce, ease or lessen the burden on the employer, but will not cover it completely. Obviously, the size of the cost will be different for each company and each situation, and this analysis is not intended to summarise the various cases; however, it is somewhat perplexing that the legislator refers to the burden being "alleviated to a sufficient degree", leaving a wide margin for discretion. In the case of companies with fewer than twenty-five employees, the scope of the excessive burden seems to be limited, but this is not the case for other companies. In principle, the larger the size, the greater the turnover and the greater the resources, and the company should obtain proportionally greater public aid when the Government establishes it, but this will not be the best criterion for measuring the 'excessive' burden or the 'sufficient' reduction, this being an area open to court action.

Furthermore, there is another turning point here, beyond the fact that the government adopts this aid and without prejudice to the consideration that the processing of any public aid, with some exceptions, usually exceeds the time limit available to the employer to adopt these alternative measures. The question is whether the reference is to any public aid, even if it is not intended for this purpose, or, on the contrary, only those measures that pursue this objective will be taken into account, as would be reasonable. The doubt seems pertinent. Firstly, because during the pandemic, any public aid was taken into account when certain employment effects were limited, for example, in the area of dismissal. Secondly, because there are measures geared to the promotion, inclusion and maintenance in employment of persons with disabilities. However, the truth is that this employment legislation does not refer to disability or illness, but to incapacity, and links the termination of the contract to the declaration of incapacity - and to the granting of its benefit, *ex* Article 174(5) of the Social Security Act, also amended by Act 2/2025, when the provision establishes that permanent incapacity benefits must be suspended

during the performance of the same job with adaptations or another job that is incompatible with the receipt of the appropriate pension. Therefore, the only aid to be taken into account shall be that adopted for this exclusive purpose, since, otherwise, the legislator should have used — as it has done on many other occasions — terminology more in line with the situations of exclusion suffered by disabled persons.

4. *And finally, the time limits for deciding whether to end or maintain the employer-employee relationship*

The entire regime described is subject to two important time limits: one affecting the employee and the other affecting the employer. The first is undoubtedly more relevant because, once it has passed, the employer is released from any obligation and may terminate the contract. Thus, Article 49(1)*(n)* of the Workers' Statute Act provides that the employee has a time limit of ten calendar days from the date on which he or she is notified of the decision declaring the permanent incapacity to inform the company in writing of his or her wish to maintain the employer-employee relationship.

As is well known, in both private and public law, it is necessary to distinguish between claims (demanding that someone perform a certain act of giving, doing or not doing) and constitutionally-recognised statutory rights. The latter do not contain any claim against a third party, but rather a power that allows the holder to create, modify or terminate a legal relationship that is different, in whole or in part, from the status quo that existed previously. The fundamental consequence of this distinction is that claims are subject to time-barring (limitation period), while constitutionally-recognised statutory rights are subject to time-lapsing (extinguishment period), i.e. to time limits that cannot be interrupted.

In principle, what Article 49(1)*(n)* grants the worker is the right to make a legal statement reconstituting his or her existing contractual status suspended by the declaration of permanent incapacity. By expressing his or her willingness to maintain the contractual relationship, the worker "resurrects" what could be considered "latent" with the declaration of permanent incapacity, and this is always subject to time-lapsing. Therefore, the ten days must be considered an extinguishment period and not a limitation period, without allowing for any suspension.

As such, an application problem may arise, namely that the last day of the ten days considered is a non-working day. Regardless of whether they are working days or calendar days, it may happen that on the last day of the time limit the employee is unable to make his or her statement of intent to the company. This is not because such a statement must be received, but because it cannot be made in practice. In this case, the provisions of Article 133(4) of the Civil Procedure Act shall apply, according to which time limits ending on a Saturday, Sunday or other non-working day shall be extended until the next working day.

It could be argued that, as these are calendar days, as provided for in the aforementioned Article 49(1)(*n*) of the Workers' Statute Act, they should be counted from date to date and, if non-working days have

been taken into account in the intermediate calculation, why not consider them in the final calculation. However, this is an erroneous approach. The problem of the last non-working day is common to all calculation formulas, regardless of how they are considered in the interim period. The controversy cannot be resolved by reducing the number of days available to those who are entitled to exercise that time limit, which cannot be reduced. It is necessary to act in a manner consistent with procedural and administrative laws when the last day is a non-working day, expressly choosing to extend the time limit to the next working day.

The time limits granted to the employee and the employer must be understood as lapsing, not allowing for suspension

In this case, the time limit would be extended to the next working day, not because the day is a non-working day, but because the employee was unable to exercise his or her right on the last day of the time limit. Therefore, if the employee could do so, if he or she could communicate his or her decision to the company on that day (because the company has an open mailbox, a constant communication channel, a server with unlimited service, in short, any means that allows the employee to convey his or her choice to the employer), the extension of the time limit would not be necessary. Receptivity is not required, so the employee would have fulfilled his obligation in in the prescribed time and manner.

However, there is another time limit, which the law grants to the employer to make adjustments or find a vacant and available position after the employee has expressed his or her interest in continuing to work. The company will then have a maximum period of three months from the date on which it is notified of the decision declaring the permanent incapacity to make reasonable adjustments or change the job. When the adjustment involves an excessive burden or there is no vacant position, the company will have the same time limit to terminate the contract. The decision must be justified and communicated in writing to the employee.

Extinguishment period or limitation period? Well, as in the previous case: extinguishment period. This resolves any doubts that may arise from the company offering the employee an alternative, the employee rejecting it, the company continuing to offer alternatives and each offer and each rejection being construed as serving to interrupt and restart the three-month period. This makes no sense. It is not what the legislator intends (who sets the maximum period at three months) nor would it be proportionate to the contractual equilibrium. In this case, yes, like any termination notice, it will be considered receptive, and the procedural time limit for any claim will begin from the notification of the company's decision to the employee.

It is true that the legislator has not made it easy by creating doubts when specifying that 'when the adjustment involves an excessive burden or there are no vacant positions, the company shall have the same time limit to proceed with the termination of the contract". And so, it might seem that it has three months to make adjustments or find a vacancy and, if either or both of these possibilities are rejected, three more months to terminate the contract. However, this interpretation does not seem to be in line with the rule:

— Firstly, because it would not clearly determine the *dies a quo* of the 'second' three-month period; When does it begin? When the employee rejects it for the first time, the second time, the third time...? When the employer reaches the conclusion that it cannot adapt or offer a vacancy? When the prevention service issues a report with different alternatives? When the employee understands that the offer is not suitable? When the possible conflict between the two parties is resolved? So many unknowns are contrary to legal certainty.

— Secondly, because the legislator has established a maximum time limit. Yes, it is understood that this is to make adjustments or offer a vacancy, but, ultimately, so that, once it has been established that this is impossible, the contract can be terminated. Of course, the contract may be terminated before the time limit if the alternatives have been tried and the decision has been made, but in any case, the maximum limit of three months cannot be exceeded in order to comply with the obligation.

— Thirdly, because any delay in this matter entails a public cost, since the permanent incapacity benefit is maintained throughout this process until the termination of the contract.

— And fourthly and finally, for reasons of legal certainty. The maximum time limit of three months ensures that the termination will not be classified as discriminatory dismissal, which would be the case if, after the three months had elapsed, the employee remained in his or her job and was then dismissed on grounds of supervening incompetence or any other reason, as such a business decision could be found unlawful on grounds of discrimination.

However, expiration periods do not in themselves involve the automatic termination of the contract. As with any contractual termination, an express statement of intent to terminate is required and, if the contract is not terminated after the relevant period has elapsed, the relationship shall be deemed to remain in force. The contract is only terminated by express statement of the parties, in this case the employer, but the law does not attribute the termination to the latter, who must expressly state it. Furthermore, nothing obliges the employer to terminate the employment contract. The employer is completely free to keep the employee in their company, accepting the new incapacitating situation. Therefore, if, after the ten days that the employee has to notify his or her decision to the

employer, the latter decides to maintain the employer-employee relationship, nothing prevents it from doing so. And if, after three months, the employer decides to maintain the employer-employee relationship, there is no objection to doing so. However, once the time limits have passed, the employer is under no obligation. And if, after ten days, the employer considers that the contract has been terminated and subsequently decides to engage the worker, this will be a new relationship, with a new contract and new seniority, unless otherwise stated.