Employment Update

Christmas Hampers - generous gift or company duty?

19th December 2019

Regarding the Supreme Court Ruling of 19 November 2019

Many companies promote Christmas lunches and/or dinners, as well as deliveries of Christmas hampers or gift vouchers to workers that can be exchanged in shopping centres, and gifts of the Three Kings for employees' children.

It seems untrue that a decision that most of the times arises from the strictest liberality of the employers, with no obligation (neither contractual nor by collective agreement) of its concession, and normally tied to the results of the company and discretion, is increasingly being questioned by unions and legal representatives of the workers from the moment that the company cancels or suspends its realization (lunches/dinners) or its delivery (Christmas hamper/gift voucher).

The legal key in the delivery of Christmas hampers is focused on discerning whether there is a more beneficial condition (CMB) which as such is incorporated into the obligatory package of the contract and cannot be unilaterally removed, or if on the contrary, it is a mere and simple liberality, without the company ever having the unequivocal will to consolidate it in the future.

Historically, the former Central Labour Court (the predecessor of the current Social Divisions of the High Courts of Justice) repeatedly declared that Christmas bags and gifts did not reward work but were gifts in consideration of the traditional holidays and were not legally enforceable. However, this interpretative criterion has long since been modified.

1.- An example of this is the recent and much publicized ruling by the Social Chamber of the Supreme Court on 19 November 2019 (RC 83/2018), confirming a precedent set by the National Court on 6 February 2018, which declared the right of all employees of Fujitsu Technology Solutions to receive the 2016 Christmas basket, which was unilaterally abolished by the company.

It was proven that from the beginning of its activity until 2012, the company (with around 1,600 workers throughout the country) had given the workers concerned a Christmas hamper (except for 1997, when it was replaced by a gift voucher).

In 2013, the company decided to abolish it, without this decision being contested, and since then, the delivery had not been made; it was noted, however, that in 2014, 2015 and 2016, the trade union representatives (of the applicant union UGT-FICA or of USO) requested its reestablishment.

The Supreme Court therefore considers that the hamper was delivered from the beginning of the company's activity without any solution of continuity until the year 2013, "and it cannot be denied that in that act of the company the defining notes of the most beneficial condition are appreciated. Not only is it a matter of regular, constant and repeated delivery every year, but it is also clear that such an offer was made with the full and conscious intention of benefiting the workers on the staff, all of them without exception or conditioning'.

He goes on to say that: "The delivery of the Christmas hamper does not take place merely because the company tolerates it, as it is clear that, given the size of the workforce, this delivery involves an economic outlay that necessarily has and must be approved and financed, and, moreover, requires a certain amount of organisation and logistics - the company must determine the number of hampers it needs, acquire them from the market and organise their distribution or the system by which the hampers reach the hands of each of the workers".

2.- The ruling warns that a general criterion cannot be set for all cases according to which the delivery of the hamper always constitutes an acquired right as CMB, or, on the contrary, a mere liberality of the company, so that the result of the judicial solutions may be different depending on the characteristics and evidence of the circumstances of each case.

The Supreme Court recalls that the question of the delivery of the traditional Christmas basket has led to several pronouncements by the Social Court that addressed the question of whether it constituted a CMB.

Thus, he recalls that to date the Chamber has issued four rulings in which the delivery of the Christmas basket is considered to be a CMB, while in a fifth decision it took the opposite view, denying the consolidation of the right to its delivery because the concurrence of the characteristic and defining elements of the CMB was not accredited.

A.- **What were the pronouncements in favour of the existence of a CMB?**

i.- In the Supreme Court Ruling (STS) of 21 April 2016 (RCUD 2626/2014) the company **Mecalux** was obliged to return the Christmas basket for 2012, valued at 66 euros, for the technicians and administrative staff of the Gijón-based company Esmena, with which it had merged in 2011. It was noted that "it had been enjoyed since time immemorial, persistently - it was granted every year - and under the same conditions".

ii.- In the STS of July 12, 2018 (RC 146/2017), the company **Transcom Worldwide Spain** was obliged to give its employees the 2016 Christmas basket, the distribution of which, after almost a decade, the company decided to cancel and replace with a cocktail party. The last hamper they received, in 2015, consisted of a panetone of 4 euros in value. It was proved that the Christmas hamper had been delivered by the company "without solution of continuity since 2007 to the workers in number over 3,200 each year, and has been maintained despite that figure has been increasing to reach 4,297 hampers in 2012 and over 5,000 in 2013, which is a manifestation of the willingness of the company to maintain and extend it to new workers despite the significant increase in their number.

iii- In the STS of 6 March 2019 (RC 242/2017), the company **Atos Spain** was condemned because "despite the fact that there is no collective agreement or pact establishing the right of the workers to the Christmas basket, the company included this group in the delivery of the basket, precisely because of the agreements signed with the other groups. There is no denying the parallelism followed by these workers with regard to what has happened to the others in relation to whether or not they receive the Christmas basket, and the company can only state that it wishes to maintain the same system for this group of workers, even though there is no evidence of the delivery of the basket in 2006 and 2009".

iv.- And in the STS of October 2, 2019 (RC 153/2018) it was ruled in favor of the workers of the company **R Cabe and Telecomunicaciones Galicia**, who were left without a Christmas basket in 2017, coinciding with the absorption of the society by Euskaltel. The company was ordered to pay the 190 workers who were on the payroll that year 60 euros in compensation, when it was found that "the Christmas hamper had been handed over without break "for more than seventeen years" (...), specifically in the month of December of each year, being in 2016 when it was received in the amount of 60 euros while in 2015 it had been for a value of 80.59 euros, and in 2017 when the company stopped giving it".

B.- The only ruling **in favour of the non-existence** of CMB occurred in the STS of 16 November 2016 (RC 27/2016) in proceedings against the company Endesa because there was no proof of the presence of the characteristic and defining elements of CMB.

It is curious that the Labour Chamber forgot to mention also in this section the STS of 12 March 2019 (**Worldline Iberia**; RC 230/17) since it validated the non-existence of a CMB related to the Christmas basket in the interpretation of the collective agreements in which it was agreed that it would be granted "as long as economic conditions allow". As the company had demonstrated large losses, it was not obliged to hand it over. It was a clause that was not a CMB and was not illegal because it was not left to one of the parties to grant it or not.

3.- Although it would go beyond the present commentary, the analysis of other precedents analyzed by the High Courts of Justice and the National High Court, if we want to highlight some of them. For example, the Audiencia Nacional's decision of March 13, 2019 (**Qualytel**; orders 41/2019), in which the right of 4.500 workers to receive the Christmas gift, (different every year and with a small individual amount) given by the company from 2002 to 2017, without it being feasible to "change" it unilaterally by the company, which decided to donate its amount to various NGOs, because it was a CMB accredited by the company's own acts, which did not prove, nor did it try to prove, that it was never its intention to consolidate the right. He went so far as to say that the company's conduct was a "manifestation of arrogance, worthy of a better cause, since it cannot unilaterally allocate a benefit, recognized for each of its workers for 15 years, to other purposes, without the workers' representatives and the accreditation of the corresponding causes".

4.- **By way of conclusion.** It is not a simple task to identify the limits that in each specific case separate simple liberality from the tacit business will to recognize a CMB, and it must be to the particular circumstances in the singular case to distinguish one or the other situation.

In general, the reiteration in time of the delivery of the Christmas baskets and their extension to the entire workforce make it CMB of the employment contract, without it being possible to take it as an act of mere liberality of the company.

The same would be preached about the Christmas lunches/dinners paid by the companies and the deliveries of gift vouchers and presents from the Three Kings.

5.- **Recommendations.** The policy carried out by the companies in the present year and in past years remains there and cannot be altered. In short, perhaps unwittingly, entrepreneurs have already been able to generate a CMB with the traditional Christmas hamper, as its characteristic and defining elements have been brought together.

Notwithstanding the above, if one wishes to avoid the genesis of a CMB, the company can establish a series of mechanisms that allow its suspension or suppression in the future.

Following other Supreme Court precedents regarding CMBs, the fact that a company, when setting a certain benefit for workers, expressly establishes that "the company reserves the right to suppress or modify the conditions of this policy", technically implies that there is no desire to consolidate the benefit in question in the future (STS 12-7-2016; RC 109/2015, in relation to Citibank and the policy of paying out cash bonuses upon completion of certain years of service). And "provided that economic conditions permit" (in line with STS 12-3-19; RC 230/2017).

Finally, it should be noted that in the event of a succession of contracts, the subrogation of all the rights and benefits acquired by the workers of the previous contractor would also apply. This has been declared in a ruling by the National Court of 2 October 2019 (right to receive as CMB the supplement called "Christmas hamper", every December, and in its absence the sum of 100.)

You can read the full sentence for more information.

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