Corte costituzionale

JUDGMENT NO. 116 OF 2011

Ugo DE SIERVO, President

Alessandro CRISCUOLO, Author of the Judgment

JUDGMENT NO. 116 YEAR 2011

In this case the Court considered the legislation applicable to the commencement of mandatory maternity leave. In this case the lower court was seized of an application from a woman who, following the birth of her premature child and the admission of the child to hospital, had requested that she be allowed to start her period of mandatory leave from the time the child was discharged from hospital, provided that she was medically fit to work during the intervening period (the latter period falling during the statutory period of mandatory leave). The Court struck down the contested legislation insofar as challenged as unconstitutional on the grounds that it risked thwarting the goals pursued by the legislation as a whole, supported by constitutional principles, of *inter alia* promoting the establishment of a psychological link between mother and child.

(omitted)

JUDGMENT

in proceedings concerning the constitutionality of Article 16 of Legislative Decree no. 151 of 26 March 2001 (Consolidated text of legislative provisions on the protection of and support for maternity and paternity, enacted pursuant to Article 15 of Law no. 53 of 8 March 2000), initiated by the *Tribunale di Palermo* in the proceedings pending between C. C. and the *INPS* [National Institute for Social Security] and another by the referral order of 30 March 2010, registered as no. 215 in the Register of Orders 2010 and published in the *Official Journal of the Republic* no. 33, first special series 2010.

Considering the entry of appearance by the *INPS*;

having heard the Judge Rapporteur Alessandro Criscuolo in the public hearing of 22 March 2011;

having heard Counsel Antonietta Coretti for the *INPS*.

(omitted)

Conclusions on points of law

1. — By the referral order mentioned in the headnote, the *Tribunale di Palermo*, sitting as an employment court questions – with reference to Articles 3, 29(1), 30(1), 31 and 37 of the Constitution – the constitutionality of Article 16 of Legislative Decree no. 151 of 26 March 2001 (Consolidated text of legislative provisions on the protection of and support for maternity and paternity, enacted pursuant to Article 15 of Law no. 53 of 8 March 2000) "insofar as it does not make provision, in cases involving premature birth where the newly born child requires a period of admission to hospital, for a right of the mother in employment to benefit from mandatory leave, or a part thereof, from the time the child enters the family home".

2. — The lower court states that – following a premature birth in which her daughter, who was due to be born on 1 July 2005, had been born on 25 March 2005 and immediately admitted to intensive care at the Palermo Hospital from which she was only discharged on 8 August 2005 – an employee mother had requested the National Institute for Social Security (*INPS*) to benefit from the compulsory leave period starting from the expected date of birth or the entry of the newly born child into the family home, stating her willingness to work for her employer until either of those dates, but that the *INPS* had rejected the request. Accordingly, the employee initiated interim proceedings against the said Institute and against Telecom Italia Mobile (TIM) Italia Spa pursuant to Article 700 of the Code of Civil Procedure, following which the *Tribunale di Palermo*, accepting the application, ruled that the woman was entitled to take a leave of absence starting from 8 August 2005 for the following five months, setting a mandatory time limit of thirty days for the start of the merits proceedings, which had been initiated by an application seeking to obtain a declaration that the claimant was entitled to take a leave of absence for the aforementioned period of time.

In view of the above, the lower court observes that there is a precedent for the contested provision in Article 4 of Law no. 1204 of 30 December 1971 (Protection for working mothers), as amended by Article 11 of Law no. 53 of 8 March 2000 (Provisions on support for maternity and paternity, the right to treatment and education and concerning the coordination of time between cities). Article 4, which was subsequently repealed along with the entire Law no. 1204 of 1971 by Article 86 of Legislative Decree no. 151 of 2001, provided (*inter alia*) for a prohibition on the assignment of work to women during the three months following childbirth.

The referring court recalls that by judgment no. 270 of 1999, the Constitutional Court ruled Article 4 unconstitutional "insofar as it did not make provision in cases involving premature birth for the period of mandatory leave to commence in such a manner as to ensure adequate protection for the mother and the child". It observes that, also according to the provisions of Article 16, the mother's application seeking to use the entire leave period (three months plus two months) from the date of entry of the child into the family home, or from the expected date of birth, could not be accepted, whereas the employer remained under an obligation not to assign work to the woman for the period referred to above, the breach of which constituted a criminal offence (Article 18 of Legislative Decree no. 151 of 2001).

It also states that it cannot endorse the interpretation by the court which issued the interim ruling, having regard to the criminal penalty provided for under Article 18 in the event of non-compliance with the provisions contained in Article 16 of Legislative Decree no. 151 of 2001, and raises a question concerning the constitutionality of Article 16, with reference to the principles mentioned above (as set out in the statement of facts).

3. — As a preliminary matter, counsel for the *INPS* has averred that the question of constitutionality is inadmissible, asserting that from 2001 onwards, following judgment no. 270 of 1999 of this Court, Parliament had adopted "one of the possible solutions which was capable of remedying the fact that, in cases involving premature birth, it was not possible for the entire mandatory period of leave from work to commence after the actual birth, thereby bringing the arrangements applicable to cases involving birth at term and those involving premature birth into line with each other".

Accordingly, the request for a substantive ruling was not required under constitutional law, but was one of the possible choices reserved to the discretion of the legislature, as moreover precisely this Court had highlighted in the ruling referred to above.

The objection is groundless.

Whilst it may be true that the Court observed in judgment no. 270 of 1999, after pointing to the "incongruence between the provision at issue and cases involving premature birth", that various solutions were possible "with specific regard to the commencement of the period of leave, moving its start either to the time the newly born

child entered into the family home, or to the expected date of the natural term of a normal pregnancy" (section 5 of the *Conclusions on points of law*). The same judgment highlighted that the former solution was analogous to that adopted in cases involving the pre-adoptive fostering of a newly born child (judgment no. 332 of 1998), whilst the latter was endorsed by draft bill no. 4624 laying down "Provisions on support for maternity and paternity and to harmonise working hours, treatment and the family", tabled by the Government in the Chamber of Deputies on 3 March 1998. It added that "The choice between the different possible solutions is reserved to Parliament", though in any case ruled unconstitutional Article 4(1)(c) of Law no. 1204 of 1971 insofar as it did not make provision in cases involving premature birth for the period of mandatory absence to commence in such a manner as to ensure adequate protection for the mother and the child.

In view of the above, leaving aside the matters which will be addressed below when examining the merits of the question, a further reflection should be made as to whether the date from which the mandatory period of maternity leave commences in cases involving premature birth is determined in a mandatory or discretionary manner.

It cannot commence from the expected date of the natural end of a normal pregnancy. This rule is used in order to calculate the two months prior to the expected date of birth (Article 16(a) of Italian Legislative Decree no. 151 of 2001), because it is the only rule which can be used in relation to an event which has not yet occurred, but which it is reasonably certain will occur. However, the same cannot be said for premature births, since in such cases the reference to the expected date constitutes a hypothetical reference to an event which in reality has already occurred, and hence the criterion amounts to a mere fiction which does not make it possible to assess whether it is appropriate for guaranteeing full and adequate protection to the mother and child for the full period of leave to which she is entitled. Besides, in establishing a rigid link between the commencement of post natal leave and the date of birth, Parliament has shown that it wishes to have a certain reference for the start of that period.

Accordingly, in order to determine the start date for the leave of absence in cases involving premature birth, the other solution is to anchor the relative date to the entry of the newly born child into the family home – upon conclusion of the period of admission to hospital – that is to a certain time, which is certainly capable of establishing that life

communion between mother and child which the immediate admission of the newly born child to hospital had not permitted. Therefore, this solution appears to be the only one which is feasible, with the result that the objection raised by the pension institute is groundless.

4. — On the merits, the question is well founded.

It should be stated that, according to the case law of this Court (judgments no. 270 of 1999, no. 332 of 1988 and no. 1 of 1987), the mandatory leave of absence currently provided for under Article 16 of Legislative Decree no. 151 of 2001, undoubtedly has the goal of protecting the health of the woman during the period falling immediately after the birth in order to enable her to recuperate sufficiently in order to return to work. However, the provision also considers and protects the relationship which is established during that period between mother and child, not only with regard to needs which are strictly biological, but also with reference to requirements of a relational and emotional nature associated with the development of the child's personality.

Article 16, which appears at the start of the section containing the legislation regulating maternity leave, prohibits work by women: a) during the two months prior to the expected date of birth, expect as provided for under Article 20 (which provides that this leave may be flexible in nature); b) if birth occurs after that date, for the period falling between the expected date and the actual date of birth; and c) during the three months following the birth, except as provided for under Article 20. Finally, letter d provides that the prohibition shall also apply during any additional time not taken as leave prior to the birth, in the event that birth occurs before the expected date. This time are then added to the period of maternity leave after the birth.

As may be seen, the principle according to which the mandatory post natal leave commences under all circumstances from the date of birth has remained unchanged, even in cases, such as the case under examination, in which the birth is not only early, but even very premature, such as to require the immediate admission of the newly born child to a public or private hospital, where he or she must remain for periods which may even be lengthy.

In such cases – as this Court has already held (judgment no. 270 of 1999) – once the mother has been discharged, although she is enjoying mandatory leave, she cannot take any action to care for her child in hospital. At the same time however, the period of

mandatory leave is passing, and she is obliged to return to work when the child requires care at home. Moreover, the addition of the further time not taken as leave prior to the birth to the period of post natal maternity leave cannot be regarded as sufficient in order to remedy this situation since this period is in any case short (at most two months), and cannot guarantee the achievement of both goals (referred to above) of the institute of a mandatory leave of absence from work.

It is sufficient to consider that, in the present case, compared to the expected date of 1 July 2005, the girl was born on 25 March 2005 and remained in hospital until 8 August 2005, that is almost for the full term of the mother's mandatory leave of absence before and after birth.

In similar cases, as is clear, the goal of protecting the relationship which should be established between mother and child during the period falling immediately after the birth is *de facto* thwarted. This situation is inevitable when the woman is not able to return to work on health grounds (which mandatory post natal leave is also intended to protect), and should therefore immediately benefit from that leave. However, the same cannot be said if it is the woman herself who requests, upon presentation of medical documentation certifying that she is fit to return to her duties, that she return to work in order to be able to use the remaining period of leave starting from the date of entry of the child into the family home.

In this situation, the obstacle preventing that request from being accepted, consisting in the strict rule that the period of leave is to commence from the date of birth, breaches both Article 3 of the Constitution on the grounds of the difference in treatment – not supported by a reasonable justification – between birth at term and premature birth as well as the constitutional rules laid down in order to protect the family (Articles 29(1), 30, 31 and 37(1) of the Constitution).

The argument of the pension provide that the principles laid down are properly safeguarded by other institutes provided for under the applicable legislation, such as leave due to the child's illness or voluntary leave, cannot be endorsed. These are in fact different arrangements which are intended to guarantee different additional protection, and cannot be invoked in order to justify the lack of protection in the situation referred to above.

As regards the start of the of the mandatory post natal leave, in cases involving premature birth where the newly born child is admitted to a public or private hospital, it should commence from the time the child enters the family home upon conclusion of her period of admission to hospital. Reference is made in this regard to the considerations made in section 3 above.

5. — Accordingly, the Court must rule unconstitutional Article 16(c) of Legislative Decree no. 151 of 2001 insofar as, in cases involving premature birth where the newly born child is admitted to a public or private healthcare facility, it does not permit a working mother to benefit from all or part of the mandatory period of leave to which she is entitled from the time the child enters the family home, upon request and where compatible with her state of health attested by medical documentation.

Finally, it should be clarified having regard to Article 18 of Legislative Decree no. 151 of 2001, which punishes the failure to comply with the provisions contained in Articles 16 and 17 of the Decree with a period of detention of up to six months, that the above ruling does not extend the scope of the criminal offence. Indeed, it does not change the parties to which the provision applies or the penalty, but is limited to granting worker mothers the right for the period of mandatory leave to commence from a different time, which still remains within the scope of the contested provision.

ON THOSE GROUNDS

THE CONSTITUTIONAL COURT

declares that Article 16(c) of Legislative Decree no. 151 of 26 March 2001 (Consolidated text of legislative provisions on the protection of and support for maternity and paternity, enacted pursuant to Article 15 of Law no. 53 of 8 March 2000) is unconstitutional insofar as, in cases involving premature birth where the newly born child is admitted to a public or private healthcare facility, it does not permit a working mother to benefit from all or part of the mandatory period of leave to which she is entitled from the time the child enters the family home, upon request and where compatible with her state of health attested by medical documentation

Decided in Rome, at the seat of the Constitutional Court, *Palazzo della Consulta*, on 4 April 2011.

(omitted)