

HelpAge España, February 2022

## **HelpAge España Submission on the Normative Content of Right to work and Access to the labour market**

12th Working Session of the Open-ended Working Group on Ageing, 2022

### **Definition**

In Spanish legislation there is no specific definition of the 'right to work and access to the labour market for older persons'. There is a constitutional recognition (of a general nature) of the right to work (art. 35).

A possible definition of this right could be:

*"Older persons have the right to decent and sufficiently paid work. No one may be discriminated for reasons of age in the access to and performance of their work. The public authorities shall adopt the necessary measures to guarantee access to work for those over 50 years of age".*

### **Scope of the right: prohibition of discrimination, programs to promote hiring and flexible retirement schemes**

Spanish legislation does contain a **specific prohibition of discrimination against older persons related to employment**:

1. Indirectly, this prohibition is contained in a general way in art. 14 of the Spanish Constitution, insofar as it prohibits discrimination against persons based on "any personal or social condition or circumstance" (among which age should be included; STC 75/1983).

Specifically, constitutional jurisprudence considers that:

- *The constitutionality of the establishment of an age limit is its justification in relation to the characteristics of the job that have a decisive influence on the effective performance of the service. If this does not happen, the limitation is unconstitutional, so that ... the establishment of a maximum age limit in an indiscriminate manner does violate art. 23.2 CE (right of access to public offices) because the differentiation carried out is not based on a sufficient reason (STC 37/2004).*
- *There is a manifestly unconstitutional use of the power to establish time limits to work, since no other criterion than age was used to decide which persons should retire (early) and which should not (STC 280/2006).*

2. The prohibition of discrimination is also established in the Workers' Statute (art. 17.1):

*"Regulatory precepts, clauses of collective bargaining agreements, individual agreements and unilateral decisions of the employer that give rise in employment, as well as in matters of remuneration, working hours and other working conditions, to situations of direct or indirect unfavourable discrimination on the basis of age or disability shall be deemed null and void..."*

3. For its part, Council Directive 2000/78/EC of 27 November, establishing a general framework for equal treatment in employment and occupation, establishes (art.1):

*"The purpose of this Directive is to lay down a general framework for combating discrimination based on religion or belief, disability, age or sexual orientation in the field of employment and occupation, so that The principle of equal treatment is applied in the Member States."*

4. From the Court of Justice of the EU, the judgment that resolves the preliminary ruling in the Case Werner Mangold v. Rüdiger Helm is of interest, in which it is declared that the principle of non-discrimination on the grounds of age is a general principle of Community Law which must be guaranteed, also, as is the case, in the workplace.

In relation to **regulatory measures to promote the hiring of older people**, there are two types of tools: those that affect the wage cost of workers (rebates on social security contributions, subsidies for hiring, etc.), and those focused on the temporary nature of the employment relationship as a stimulus to hiring. Two specific regulations (one State and the other Autonomous Law) exemplify them:

- Royal Decree 818/2021, of 28 September, which regulates the common activation programs for employment of the National Employment System.
- ORDER 10/2018, of 12 July, of the Department of Sustainable Economy, Productive Sectors, Trade and Labour (Generalitat Valenciana), approving the regulatory bases of the employment promotion program for the hiring of people belonging to vulnerable groups.

In relation to **retirement plans and flexible or gradual labour practices** for older persons, it is necessary to refer to Royal Decree 1131/2002, of 31 October, which **regulates** Social Security for workers hired on a part-time basis, as well as **partial retirement**.

*Its purpose is "to introduce greater flexibility in access to retirement, so that the age of access to it is endowed with the characteristics of gradualness and progressivity, avoiding an abrupt break between active life and the transition to retirement".*

## State Obligations

In order to protect and make effective the right to work and access to the labour market for the older persons (on the basis of general regulations), such measures must be of a different nature, but coherent and coordinated. For this purpose, a sequence like this may be useful:

- Transversal application of the principle of material equality (art. 9.2 CE), at state, regional and local levels), by virtue of which the public authorities have the obligation to adopt the necessary measures to remove the obstacles that prevent people from effectively exercising their rights.
- Rigorous diagnosis of the situation of older persons in relation to employment.
- Employment Framework Strategy, concretized in Annual Employment Policy Plans, which determine services (actions sustained over time) and programs (specific actions); all of them aimed at drastically reducing the ineffectiveness of the right to work of people over 50 years. These can be aimed, for example, at:
  - Facilitate access to training for older persons.
  - Incorporate age management plans in the human resources policy of companies to avoid discrimination after the age of 50.
  - Awareness campaigns aimed at ending stereotypes that identify older professionals as obsolete, uninterested, less prepared or weaker.