Occasional Employment Advice from ASMS

Standpoint

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Hours of work and job size

Preliminary observations

For the purposes of the national DHB collective agreement (MECA) the terms hours of work and job size do not necessarily have the same meaning and it is probably better to regard them as two separate concepts.

However, it is very important to note that MECA Clause 13.1 requires that both hours of work and job size must be mutually agreed between the individual employee and their employer. It is this requirement for mutual agreement that effectively gives members covered by the MECA a higher level of control over their workloads and work schedules than is perhaps usual for employees generally.

This is because under MECA clause 13.1 the mutual agreement in respect of both hours of work and job size must objectively reflect not only the requirements of the service but the time reasonably required by the employee to complete their agreed duties and responsibilities, as recorded in their job description.

Incidentally, this highlights how important it is to have an up-to-date and comprehensive job description.
(Refer to MECA Clause 48).

If the parties are unable to agree, by explicitly introducing the concepts of objectivity and reasonableness, the MECA allows either party to seek independent external assistance to decide the matter.

That external assistance might come from a number of quarters or agencies, including:

- a mediator from the Labour Department
- a ruling from the Employment Relations Authority
- one or more agreed independent reviewers
- a health and safety expert
- guidelines or an advisor from an appropriate medical college or professional association.

Ultimately, because the law holds individual medical practitioners responsible for their clinical practice, it will always be you as an independent practitioner and the patient's advocate who has the final responsibility and say in determining how you manage your practice, including your patient workload and hours of work.

There are probably few if any other employees, in any sector of the workforce, who have such explicit accountability for their own work and performance to external agencies and codes, beyond their employer's control.

While there is no doubt that as an employee you are always subject to the lawful and reasonable instructions of your employer, there is equally no doubt that in some matters your employer is not always your boss!

If there is a conflict between your obligations to your employer and your duty to your patients, MECA Clause 39 resolves that conflict in favour of you and your patients. In particular, it expressly records that the parties including your employer, recognise the primacy of the personal responsibility of employees to their patients and the employee's role as a patient advocate.

MECA Clause 39 Professional and Patient Responsibility and Accountability

The parties recognise:

(a) the primacy of the personal responsibility of employees to their patients and the employee's role as a patient advocate;

(b) that employees are responsible and accountable to the statutory authorities such as the Medical and Dental Councils, established under the Health Practitioners Competence Assurance Act 2003, as applicable, including their relevant policy statements and guidelines; and

(c) that employees are responsible and accountable to the ethical codes and standards of relevant colleges and professional associations.

COMMENT

Irrespective of your agreed job size, if you are overworked, stressed and tired your practice will suffer and you will put both your patients and yourself at risk of harm. Neither the law nor the Health and Disability Commissioner will recognise a defence of "tiredness".

Agreement on hours of work

An agreement on your hours of work is more than a simple statement in a letter of appointment as to the total number of hours for which you are employed and for which you will therefore be paid e.g. 48, 36 or 20 hours a week.

Hours of work as a concept is much wider than that and any agreed statement of your hours of work should also expressly record such matters as the following:

- either the frequency of your acute after-hours' roster, e.g. 1:4, 1:6, or whatever; or
- the number of on-call periods (whether weeknight or weekend) in the year for which you may be required to be on-call
- whether your acute after-hours' work is as 1st or 2nd call
- if you are part-time, when your free or non-work days fall during the week
- how many hours a week (on average) have been assessed as being necessary for you to undertake your acute after-hours' work
- if you are a shift worker, a description of your shift roster and how long each shift will be.

Agreement on job size

The agreement on your job size, on the other hand, is really just a simple statement of the total number of hours a week for which you will be paid.

MECA Clause 13.2 defines an employee's job size as the average weekly number of hours required for the employee to undertake all their duties. A list of the types of duties is set out in the clause and includes:

- routine duties such as: clinics, theatre lists, ward work, ward rounds and the full range of clinical-type meetings
- non-clinical duties, as defined in MECA Clause 11.6 or referred to in MECA clause 48.2 (d)
- work at places other than your usual workplace e.g. peripheral clinics or community visits etc
- after-hours' on-call duties, including telephone consultations and travelling time.

It is important to note that the job size must include time for the full range of non-clinical activities you and your service undertake. It must also include sufficient time for clinical meetings and those clinical duties that are not undertaken in the presence of a patient, of which there are clearly many e.g. x-ray meetings; pathology meetings; meetings with social workers; meetings with family and other caregivers and every other form of multi-disciplinary meeting you may be called upon to attend.

MECA Clause 11.6 – Definition of Non Clinical Duties

"Non-clinical duties" means duties not directly associated with the diagnosis or management of a particular patient. They may include administration, attendance at departmental meetings, formal teaching sessions, audit or other quality assurance activities and personal professional development, including journal reading and research. Duties associated with managerial or leadership roles [refer Clause 48.2 (e) – Section 5] are not to be included as part of an employee's non-clinical time.

COMMENT

Non-clinical duties are not optional extras that it would be good to do, if there was a bit more time. They are an essential part of each clinician's practice. By noting the Council of Medical College's endorsement that non-clinical activities should make up at least 30% of the total job size, the parties including your DHB have accepted that endorsement and must now apply it.

Having said that, there is a requirement for each department and each individual clinician to develop and participate in a regular program of non-clinical activities. Not all the non-clinical work needs to be done on-site but because of its collective nature we would normally expect about two thirds of your non-clinical duties to involve others and therefore should be done on site e.g. meetings, teaching and peer review discussions.

Your agreed job size will ordinarily be expressed in terms of hours per week e.g. 28, 35, 40, 45 hours/week or whatever.. This may also be converted or expressed as a proportion of an FTE (full-time equivalent) and may be more or less than 1.0 FTE.

In our view it is a mistake and likely to confuse people to express your job size as so many sessions or so many tenths. Our advice is to use hours as the unit of your job size. That does not mean sessions have no place, but it is probably best to reserve the use of that term as a unit of work to describe the amount of time required for a specific task and an outpatients' clinic, procedures' list or theatre list.

The number of hours allocated for a session is a matter of local practice (within each DHB) or may be agreed on an ad hoc or individual basis.

Hours of work and job size are legally binding

Because hours of work and job size are both matters requiring agreement, they cannot be set or changed unilaterally by either the employer or the employee. Once agreed, they form part of your employment agreement with your DHB and may not be changed without further discussion and agreement.

Perhaps it should be noted here that an employee has no more right to reduce their weekly hours unilaterally than their employer has to increase them unilaterally.

Before an individual's hours of work or job size may be increased or decreased there must be a proper process which may include investigation, analysis, consultation and agreement. All of this may take weeks or even months but may be initiated at any time by either the employer or the employee.

How to job size

If approached correctly, job sizing is easy and simple.
The ABC of job sizing is set out below:

1. Roles are job sized, not individuals. A job size is based on averaging. This avoids the need to make allowance for individuals who work faster or slower than their colleagues.
2. Job sizing should also be done in a group because it is really the service that is job sized. If done properly, it will produce the average weekly number of hours of work required to meet the requirements of the service (having regard to the service's contracted volumes or the demographics of the region) which may then be distributed amongst the number of clinicians in the service, according to whether they are full-time or part-time.
3. Diaries are unreliable and unnecessary. The only time you may need to keep a diary is to record your after-hours' work.
4. The most reliable and effective job size exercise is done in a meeting, round a table, with a white board, a computer and a spreadsheet.
5. You start by using the whiteboard to draw up a list of ALL the clinical activities you can think of that are required by your particular service. These will include the obvious patient-contact type activities such as: consultations; out-patient and other clinics; theatre and procedure lists; ward rounds (surgeons) and ward work (physicians etc). It should also include all the other type of non-patient-contact clinical activities such as: triage and attending to letters of referral; x-ray, pathology and family meetings; other multi-disciplinary meetings; GP telephone calls; dealing with social workers, OTs, physiotherapists, social workers, the police, the coroner, etc and searching the literature about the particular condition and management of a particular patient.
6. The next step, in discussion with your colleagues, is to reach agreement (or consensus) as to the amount of time i.e. number of hours it would be reasonable to spend undertaking each of these clinical activities in the course of a week. The measure of what is reasonable is really what your College guidelines would say (if there were any) or what the Health and Disability Commissioner might expect if he found himself reviewing a complaint about your practice.
7. At this point you should begin to develop your spreadsheet, recording in a table the agreed number of hours for the whole service that are reasonably and objectively required for each of the identified clinical activities.

8. You have now identified the part of your job size that is your clinical work. Consistent with the recognised professional standard in the MECA, normally this should be up to or around 70% of your total job size (excluding time on after-hours call duties and clinical or managerial leadership responsibilities). This is on the assumption that your total job size is not excessively above 40 hours per week. In a notional 40-hour week about seven half-days or around 26-28 hours is a reasonable yardstick.
   NOTE – time allocated or required for management, Clinical Director or HoD duties is neither clinical nor non-clinical and it will not attract an additional non-clinical loading.
9. Next, by a similar process to that outlined in points (5-7) above with your colleagues you should draw up your non-clinical hours. Again consistent with the recognised 30% minimum standard in the MECA, a reasonable yardstick in a notional 40-hour week is that time for non-clinical duties would be around three half-days or about 10-12 hours. It is recognised, however, that some colleagues in the same department may be doing more non-clinical duties (eg, teaching, research). Further, some activities may include both clinical and non-clinical duties (eg, teaching RMOs and nurses on ward rounds).
10. It may be useful to recall at this point that each DHB is a party to the MECA and thereby has agreed to all of its provisions, including MECA Clause 48 which sets out "the recommended guidelines" for the job description. This includes a statement in Clause 48.2 (d) that the parties note that the Council of Medical Colleges of New Zealand endorses an allocation of at least 30% for non-clinical activities. [Having noted that fact, in their own guidelines, it is disingenuous for any DHB to now claim it has not agreed to 30% for non-clinical time and the ASMS intends to hold them to their agreement].
11. Job sizing may demonstrate the need to resolve excessive workloads. If your workload is over 50 hours a week, for example, it is absurd to add more non-clinical duties in order to adhere to the 30% minimum. As stated above, a reasonable approach is to see it in the context of a notional 40-hour week of which about three half-days are allocated for non-clinical duties even if the total workload exceeds 40 hours. The key issue is that you are undertaking sufficient non-clinical duties to meet your professional standards and guidelines and to support your clinical duties and that this is captured in your job size.
12. At this point you should expand your spreadsheet and begin the process of allocating duties and hours to individual clinicians within the service, having regard to the professional standard of the minimum of 30% on an individual basis.
13. Next, add the on-call hours that have been agreed or derived from the after-hours' diary exercise, to each individual on the roster.
14. By now, you will have a comprehensive spreadsheet of all clinicians within the service, showing details of their clinical workload and job size.

Assessment of after-hours call

Your after-hours' work is reasonably easy to record and it is the only part of the job size for which diaries may need to be kept.

You may need to keep diaries for about six to eight weeks where each person on the roster records the number of telephone calls they receive or make during their period of call and how long they spend back at the hospital or wherever the call-out takes them.

For simplicity, we suggest you break your telephone calls into three groups:

- calls of short duration i.e. less than 5 minutes;
- longer calls i.e. more than 5 minutes;
- calls received after you have gone to bed.

How many minutes are given to each of these calls, for job size purposes, is a matter for further discussion and may vary according to whether the calls are simply to receive information or to discuss a patient's treatment at length.

However, calls that interrupt your sleep should attract a premium and we suggest anything from 30 to 60 minutes.

If the call requires you to return to the hospital or other place of work, you should record the time from the time you leave your home to the time you return.

Although each night or weekend may vary, over a six to eight week period, we would expect a pattern to emerge from which a sound and objective average can be calculated.

When the recording period ends, the data collected on phone calls and call-outs should be pooled and moderated to produce a departmental average which may be applied to everyone on the roster.

Your normal job size does not include any time you may spend back at work when you are not officially on call. This work should be counted separately and paid differently, perhaps at a negotiated higher rate, or maybe compensated by time-in-lieu.

What happens if management doesn't agree or obstructs a resolution of a job sizing review?

Because your hours of work must objectively reflect the time reasonably required to complete your duties, there is a strong onus on your managers to reach agreement with you on these issues. Despite this, we have seen management responses ranging from the exceptionally good to the exceptionally poor.

Where a robust job sizing exercise shows that you are being significantly under-resourced for the work you are doing, some managers may try to avoid dealing with the consequences by attempting to force you into an arbitrarily reduced job size, ignoring the real resourcing issue or pleading poverty.

These responses are unacceptable. If management are unwilling to pay you for the work you are doing then it may be appropriate for you to look at ways to reduce your workload to fit your contracted job size. Depending on your managers' attitude this may be done in consultation with them or not. Either way, the goal is to identify activities that can be discontinued in a clinically safe and responsible way. At the point where you are considering this action, it is certainly wise to include ASMS and perhaps the Medical Protection Society in your discussions.

Another way to resolve these issues may be to consider treating the failure to agree as an employment relationship problem as per Clause 57 of the MECA. Where you and your manager cannot

reach agreement you may (individually or as a group) access the mediation and adjudication services provided by the Department of Labour. You should, however, contact the ASMS for advice before taking such steps.

When should job sizing be reviewed?

Job sizing may be reviewed at any time on the initiative of either affected SMOs or management in accordance with the process outlined above. Usually this is on the basis that circumstances (eg, workload levels, staffing) have changed.

By their nature, job sizing exercises tend to represent a 'snapshot' in time of your service. A good job size is sufficiently transparent that updating it to take account of changing circumstances should not be difficult to do. It may be helpful to review service and individual job size as part of regular service planning.

What are the possible outcomes of a job size review?

There are a number of possible outcomes of a job sizing review. These are:

1. Recognition that the average hours worked or required for the position exceed those being paid, and therefore remuneration should be increased. The ASMS position is that the effective date of this increase in remuneration should be when SMO colleagues in a department present management with their assessment of what the job size should be.
2. Recognition that workloads are too high and that additional staffing is required. Often this additional staffing would be more SMOs but in some cases this might be additional secretarial or administrative support.
3. A combination of (1) and (2) above.
4. Confirmation that the existing job size is about right. There is still a useful benefit in reaching this conclusion because it should lead to a better mutual understanding and improved clarification of one's duties and responsibilities.
5. The average hours paid exceed those worked and a reduction in remuneration is justified. In our experience this is rarely the case.

Conclusion

It may not always seem quite as simple as this, but in practice, it always should be.

The ASMS industrial staff are available to assist you and your colleagues - they are experienced in conducting job size reviews in accordance with these procedures.

That does not necessarily mean that every employer will meekly accept the outcome of this sort of exercise by increasing remuneration to reflect members' new and objective job sizes or by recruiting the additional medical or dental officers indicated by this exercise as being required for the service.

But the results of job sizing reviews undertaken in accordance with these procedures are irrefutable and provide a very firm basis from which to negotiate an increase in remuneration, a reduction in workload or an increase in staff.

Above all else: do it as a group, around a table, as a simple intellectual exercise, apply the 70:30 professional standard and KEEP IT SIMPLE.

MECA Clause 48 Job Descriptions

48.1 All employees are entitled to mutually agreed job descriptions.

The following is provided as the recommended guideline. For ease of reference and clarity, the job description should have several distinct sections:

(a) a list of clinical activities required of the particular position;

(b) an express statement about the standards against which the clinical performance will be assessed and judged;

(c) a list of non-clinical or "other professional" activities required of the particular position;

(d) a summary of key administrative details;

(e) a description of clinical or other management duties, if the position has a clinical leadership or management function;

(f) if appropriate, an agreed statement or list of specific objectives for the particular position; and

(g) other relevant matters and legislation such as the Treaty of Waitangi and the Health and Safety in Employment Act.

48.2 Job Descriptions should include the following sections;

(a) Section One

This section should contain the following minimum information:

Employee's name

Designation: This should be a succinct statement of the role, including any sub-specialist or special interests e.g. Specialist Urologist; Specialist General Surgeon or Specialist General Physician with an interest in Rheumatology; Specialist Child and Adolescent Psychiatrist.

Reporting to: This will contain a clear statement of the position(s) to whom the employee reports and for what purposes, ie, clinical matters and other matters. It is unlikely there will be more than two such positions. For all clinical matters, the "manager" is likely to be a senior medical or dental officer within the organisation and would ordinarily be the clinical leader or head of department (or applicable designation within each employer).

Level of Authority: This should contain a clear statement of any delegations (eg, staff and/or financial) this position may hold.

Nature of Appointment: This will be a statement as to whether the position is full-time, part-time, a locum or some other form of fixed term appointment. It should also record the total "size" of the job.

Weekly or Fortnightly Timetable: At the time of appointment, each employee is entitled to a schedule of fixed or routine duties, including a weekly timetable. It will also record the free days or half-days in each week.

Summary of On-Call Duties: If the employee is required to be on an after-hours' roster, there should be a clear statement to that effect. This section should also state the size or frequency of the roster e.g. 1:4 or 1:8 and the usual level of resident medical officer support that clearly indicates whether the call is 1st or 2nd call.

Variation to Job Descriptions: Job descriptions shall be varied from time to time to record any agreed changes to rosters and staffing levels.

(b) Section Two

This section will contain a statement to the following effect:

The medical (or dental) practitioner is required to undertake their clinical responsibilities and to conduct themselves in all matters relating to their employment, in accordance with best practice and relevant ethical and professional standards and guidelines, as determined from time to time by:

- the New Zealand Medical Association's code of ethics;
- the practitioner's relevant medical college(s) and/or professional association(s);
- the New Zealand Medical (or Dental) Council;
- the Health and Disability Commissioner; and
- the employer's policies and procedures except to the extent that they may be inconsistent with any other provision of this Agreement.

(c) Section Three

This section should contain a reasonably comprehensive list of the clinical duties and activities required of the particular position. It will vary according to the specialty and the nature of the appointment. It should also reflect any relevant college requirements.

The list of clinical duties might include some or all of the following activities:

- outpatient and other clinics
- ward rounds and ward work
- pre-theatre assessments
- operating lists
- post-operative recovery
- reading and responding to patient referral letters
- multi-disciplinary meetings, case conferences and reviews
- research and study related to the treatment of a specific patient
- telephone and other ad hoc consultations
- community health promotion activities
- discussions and meetings with care givers and patients' families
- preparation of police, coroner, legal, ACC and similar reports

(d) Section Four

This section should contain a reasonably comprehensive list of the non-clinical duties or other professional activities not covered by Section Three, required of the particular position or individual.

The parties note that the Council of Medical Colleges of New Zealand endorses that these non-clinical or Section Four activities should make up at least 30% of the total job size, not counting the average hours worked on the after-hours on-call rosters and any Section Five duties (refer Clause 11.6 above).

A list of non-clinical duties might contain any or all of the following activities:

- CME and professional self development
- teaching, including preparation time
- audit and quality assurance and improvement activities
- supervision and oversight of others
- grand rounds
- service or department administration
- research
- planning meetings
- clinical pathway development
- credentialling

(e) Section Five

If the position has a clinical leadership or service management role, this section should contain an agreed description of those duties.

(f) Section Six

If the position requires it and the parties agree, this section may contain a list of specific objectives which will be reviewed and updated in accordance with agreed timeframes.

(g) Section Seven

Job descriptions should detail any other matters such as Treaty of Waitangi obligations and the Health and Safety in Employment Act requirements.

COMMENT

An objective and reliable job size review is based on a reliable and comprehensive job description. Clause 48 of the MECA sets out a guideline for job descriptions, which both the ASMS and the DHBs have approved and recommend.

It is particularly important that each job description include a reasonably definitive weekly or fortnightly timetable and a summary of on-call duties, as recommended in MECA Clause 48.2 (a). This will give you some legal leverage to limit your workload and/or secure additional payments when there are gaps on your roster or when there are shortages of RMOs.

ASMS *Standpoint* is an official publication of the Association of Salaried Medical Specialists (ASMS). Its objective is to advise our members, district health boards and other interested parties on important issues, often stemming from the collective agreements we negotiate.