


# How Not to Arrive at the Decision to Dismiss an Employee





In Hong Kong, employees cannot bring a claim for "unfair dismissal". However, as the *Jefferies* case shows, if the employer's conduct towards the employee during employment leading up to a dismissal is irrational, this can be a breach of the employer's duty of mutual trust and confidence giving rise to substantial damages.



**T**he case of *Grant David Vincent Williams v. Jefferies Hong Kong Ltd* illustrates how an employer can breach the implied duty of mutual trust and confidence that it owes to its employee in the way it treats that employee leading up to his summary dismissal. Although in Hong Kong an employee does not have the right to bring a claim for "unfair dismissal", if the employer's conduct towards the employee during employment leading up to a dismissal is irrational, this can be a breach of the employer's duty of mutual trust and confidence giving rise to substantial damages. In the *Jefferies* case the plaintiff employee was awarded damages in excess of HK\$14 million and costs on an indemnity basis.

### The facts of the case

The plaintiff, Grant Williams, was employed by the defendant company, *Jefferies Hong Kong Ltd*, as Head of Equity Trading Asia with the title of Managing Director on 26 August 2010. The plaintiff prepared a daily newsletter for the defendant company, which the defendant distributed to 900 or so subscribers as its publication. There was a protocol in place for vetting the newsletter which involved obtaining approval from an individual in London, before being distributed from New York.

A draft of the 7 December 2010 edition of the newsletter was emailed by the plaintiff to the personal assistant of the Head of Global Equities in New York in accordance with the approval protocol to await approval from London before being distributed. By error the personal assistant distributed the newsletter without having received approval from London.

The newsletter contained an incidental reference to the existence of a "Hitler video" without any comment save a warning concerning its use of many expletives.

Within 20 hours 44 minutes after the newsletter had been sent to London for review, the plaintiff was called to a meeting lasting a little more than two minutes where he was told that he was summarily dismissed for gross misconduct. The plaintiff was handed a letter that said he was summarily terminated "on the grounds of your unacceptable and entirely inappropriate misconduct. The detail of this has been discussed with you..." (It was common ground at trial that no such discussion of detail had taken place.)

### What went wrong?

The defendant had behaved irrationally in arriving at the decision to summarily dismiss the plaintiff.

The defendant had blamed the plaintiff for what was human error of the personal assistant, and made "irrational and patently unfair conclusions" (as the court described it) in deciding to summarily dismiss the plaintiff.

On the evidence the basis for the plaintiff's summary dismissal was because the newsletter contained an inappropriate reference to Hitler and a reference to an inappropriate video known as the "Hitler video". The inference drawn by the judge (because the relevant senior executives did not attend to give evidence) was that the senior executives were worried about the possibility that the CEO of JP Morgan might react to what might be perceived to be criticisms made by the defendant of him as a CEO in the financial world. The judge held that this line of thinking lacked logic, and that putting the responsibility on the plaintiff was irrational.

There was a misconception by one of the decision makers who decided to summarily dismiss the plaintiff (and possibly other decision makers as well, but they did not appear at trial to give evidence) that the plaintiff was the author or creator of the video. This was a fundamental error.

This decision maker said that the mere mention of Hitler's name in the reference to the video concerned him and raised problems. The judge found that this reaction just did not make sense. Two witnesses for the defendant had declared in their witness statements that they considered the video racist and anti-Semitic, and that it appeared that the newsletter was propagating such, or at least condoning it. The judge held that it was not sensible or realistic to censor Hitler's name out of a marketing publication, nor was it rational to suggest that the video, or the simple reference to it, denoted a "racist or anti-Semitic connotation".

Shortly after the newsletter had been distributed, the defendant sent an email to its subscribers advising that they "inadvertently distributed Grant Williams' December 7, 2010 edition ... [of the newsletter] before it was properly vetted. That piece contained third-party material from a website that we do not condone". This email contained a factual error in that "That piece" did not contain third-party material. Furthermore, the "material"







was not distributed, but contained a reference to the existence of a piece of material. It was also described as "Grant Williams'... edition". The judge said though Grant Williams was the editor/author, it was the defendant's publication.

It was held that there had been an unreasonable effort to "tar" the plaintiff with overall responsibility because he was the creator or author of the newsletter, and its editor.

[It should be noted that those directly responsible for deciding on the plaintiff's dismissal did not give evidence to explain or justify their decision, and were not subjected to cross-examination.]

The termination letter was regarded by the judge as

evasive and possibly drafted deliberately without detail. The letter was presented at a meeting lasting two to three minutes in which the plaintiff was given no opportunity to understand the reasons for dismissal or put forward any argument.

It was held that the way the defendant handled the matter of the plaintiff's dismissal, the explanatory email and the excision of the plaintiff from all contact and association with the defendant was in clear breach of the implied duty of mutual trust and confidence they owed to him. That implied duty is that an employer will not without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between the employer and employee.



## What damages did the court award to the plaintiff?

The judge awarded damages to the plaintiff under the following two broad categories totalling in excess of HK\$14 million.

### 1. Contractual loss of earnings and benefits

The contractual claim was assessed on the basis that if the defendant had given proper notice of termination, the plaintiff would have been given six months' notice. Further, as a result of the defendant's wrongful dismissal, the plaintiff had lost his other contractual entitlements, including a grant of shares, retention bonus and guaranteed bonus. The damages awarded under this head are summed up below:

6 months' wages in lieu of notice	HK\$1,017,434.81
Restricted stock cash grant	HK\$1,945,000
Retention bonus	HK\$1,945,000
Guaranteed bonus	HK\$1,945,000
Total	HK\$6,852,434.81

### 2. Damages for breach of implied term of trust and confidence

The judge considered the following:

- That the defendant sought to put the blame squarely on the plaintiff and tried to distance itself from the plaintiff by in effect denying that the newsletter was a corporate publication;
- That the cessation of the daily newsletter would have been noticed by at least 900 subscribers and the immediate dismissal of the plaintiff would have been apparent to a wider audience;
- That given the circumstances the audience may have queried whether there was something else behind the decision to dismiss the plaintiff which did not reflect well on him;
- That an aggravating factor was the perception that the reference to the "Hitler video" somehow denoted racism, anti-Semitism and sexism;
- That the plaintiff had problems obtaining alternative employment after his dismissal; and
- That the plaintiff was left with a stigma.

The court considered that the plaintiff would only be able to return to normality and gain worthwhile employment if

he is free from the stigma attached to his dismissal and awarded the plaintiff damages for loss until 31 July 2013 as follows.

Salary from June 2011 to July 2013 (26 months)	SG\$745,875.00
Discretionary bonus for 2012	US\$250,000
Discretionary bonus for seven months in 2013	US\$145,833.33
Total	~HK\$7.65 million

## What cost award did the plaintiff receive?

The plaintiff sought an order for indemnity costs. The judge considered that the defendant's case at trial disclosed some extremely unpleasant features, and some important email communications were divulged very late into the proceedings. Further, in pursuing the litigation, the defendant did not find a realistic "negotiator", but instead found an unidentified member of the Jefferies group to respond to the plaintiff's reasonable settlement proposals. The court found the defendant's manoeuvrings to be wasteful and unconstructive.

The court ordered the defendant to pay the plaintiff's costs on an indemnity basis which provides the plaintiff with a higher recovery rate than the scale of costs that is normally ordered.

## What are the "take-away points" for employers?

In Hong Kong historically the typical remedy an employee can obtain from an employer who cannot demonstrate a valid reason for the dismissal of the employee is an order to pay "terminal payments" to the employee. Terminal payments are in effect unpaid statutory and contractual entitlements which the employer should have paid on termination of the employee's employment.

The Jefferies case illustrates how substantial damages could be awarded to an employee for breach of an implied term during employment leading up to the dismissal.


Employers must be careful not to behave irrationally when dealing with an employee. That is, an employer should ensure that it has a rational and reasonable basis for taking action against or in respect of an employee. 📌



# 决定解雇员工的 错误方式







在香港，员工不能以“不公平解雇”为由提起索赔。然而，Jefferies案表明，如果用人单位的非理性行为导致在职员工被解雇，那么，用人单位可能违反了引发巨额赔偿的坦诚互信义务。



**G**rant David Vincent Williams诉Jefferies 香港有限公司一案表明，如果用人单位处置员工的方式导致其被立即解雇，那么，用人单位可能违反了其对员工的坦诚互信的默示义务。尽管在香港，员工无权以“不公平解雇”为由提出索赔，但是，如果用人单位的非理性行为导致在职员工被解雇，那么，用人单位可能违反了引发巨额赔偿的坦诚互信义务。在Jefferies一案中，原告员工获得了超过1400万港元的赔偿以及基于补偿标准的诉讼费用。

### 案件事实

原告Grant Williams于2010年8月26日受雇于被告Jefferies香港有限公司，担任亚洲区股权交易总监，职位为总经理。原告为被告公司编制每日快讯，然后被告将该快讯作为公司的出版物发送给900名左右的用户。关于快讯审查，公司规定，任何快讯在从纽约发送前须获得伦敦某负责人的批准。

原告根据审批规定将2010年12月7日快讯草稿通过电子邮件发送给位于纽约的全球股权交易总监的私人助理，等待伦敦的批准以便发送给用户。但是由于失误，该私人助理却在未获得伦敦批准的情况下发送了该快讯。

该快讯中附带提及了一个“希特勒视频”，没有任何评论，只提醒其中使用了许多咒骂语。

在该快讯送到伦敦审查后的20小时44分钟内，原告被叫去

开了一个只有两分多钟的会议，会上他被告知因严重不当行为遭到立即解雇。随后，原告收到一封信函，称其“因不可接受且完全不恰当的行为”被立即解雇，且“这一决定的详细情况均已与您讨论过……”。（案件审理时一致认为被告未曾与原告讨论这一决定的详细情况。）

### 出了什么问题？

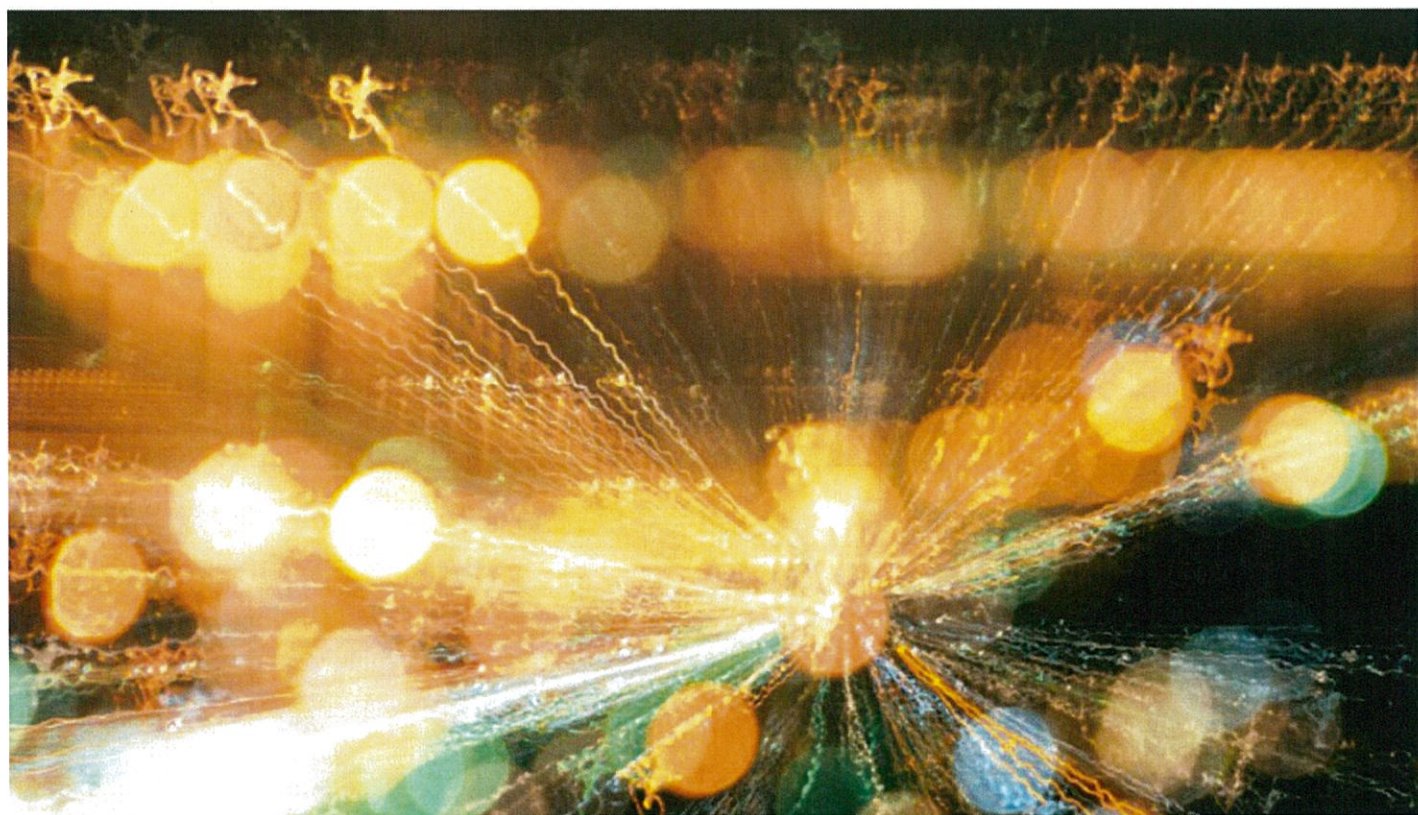
被告做出立即解雇原告的决定不够理性。

被告就私人助理的人为错误指责原告，且在决定立即解雇原告时作出了“非理性和显失公平的结论”（法庭称）。

证据方面，原告遭立即解雇的原因是该快讯包含了对希特勒以及对被称为“希特勒视频”的不恰当提及。法官推测（因为相关高管人员未出庭作证）高管担心摩根大通的首席执行官可能认为这是被告对其作为金融世界首席执行官的批评。法官认为，这种思路缺乏逻辑，而且将责任推给原告不够理性。

决定立即解雇原告的一位决策者（也可能还有其他决策者，但他们并未出庭作证）有一种误解，即原告是该视频的作者或创作者。这是一个根本性错误。

该决策者称单单在该视频的提及中谈到希特勒这个名字即令其感到担心，且会引发问题。法官认为这种反应没有任何理由。被告的两名证人在其证人证言中称，他们认为该视频





是种族主义和反犹太主义的，而该快讯看起来是对此的宣扬或至少是姑息纵容。法官认为，在营销刊物中审查希特勒的名字是不明智或不切实际的做法，并且认为该视频或仅仅是对该视频的提及表明“种族主义或反犹太主义暗示”也不够理性。

在快讯发出后不久，被告向其订阅用户发送了一封电子邮件，告知他们“Grant Williams的2010年12月7日版[快讯]未经适当审查，为不经意发送...。该快讯包含从我们所不认可的网站上获得的第三方材料”。此电子邮件含有一个事实性错误，即“该快讯”并不包含第三方材料。此外，“材料”并未被发送，而仅含有对该材料存在的提及。该快讯也被称为“Grant Williams的...版”。法官称，尽管Grant Williams是该快讯的编辑/作者，但它是被告的出版物。

法院认为，因原告是该快讯的创作者或作者及编辑即要原告承担全部责任的行为是不合理的。

（应当指出的是，那些直接负责决定解雇原告的人并未提供证据来解释或证明其决定的正当性，且未进行交叉盘问。）

法官认为解雇函是避实就虚，可能故意未起草其中细节。这一信函是在一个长度仅为两三分钟的会议上交给原告的，在这期间没有给原告了解解雇原因或提出任何反对意见的机会。

法院认为，被告人处理有关解雇原告的事宜、解释性电子邮件及将原告从被告的所有联系中排除的行为明显违反了其对原告负有的坦诚互信的默示义务。按照默示义务的要求，用人单位不能在无合理和正当理由的情况下，通过蓄意且可能破坏或严重损坏用人单位和员工之间坦诚信任关系的方式行事。

## 法院判给原告哪些损害赔偿？

法官判决赔偿原告以下两大类合计超过1400万港元的损害赔偿。

### 1. 收入和福利的合同损失

合约索偿评估基础是，如果被告已就终止雇佣关系给予适当通知，应该提前六个月通知原告。此外，由于被告的不当解雇，原告失去了其他的合同权利，包括获得股份、留任奖金及保证奖金。就此判决的损害赔偿总计如下：

六个月代通知金的工资	1,017,434.81港元
限制性股票现金津贴	1,945,000港元
留任奖金	1,945,000港元
保证奖金	1,945,000港元
总计	6,852,434.81港元

## 2. 因违反坦诚信任默示条款的损害赔偿

法官认为：

- 被告试图通过否认该快讯为公司出版物的方式将责任全部归咎于原告，并极力与原告划清界限；
- 超过900名用户可能会注意到了每日快讯的停发，且有更多受众认为原告很明显遭到了立即解雇；
- 鉴于以上情况，受众可能已经质疑解雇原告的决策背后是否有其他涉及原告的因素；
- 更为严重的是，提及“希特勒视频”被认为是在某种程度上宣扬种族主义、反犹太主义和性别歧视；
- 原告遭到解雇后另寻工作时遇到困难；及
- 这给原告造成了污名。

法院认为，原告只有在其被解雇的污名影响消除后才能恢复到正常状态并获得合适的就业机会，所以，法院判决被告赔偿原告直到2013年7月31日的如下损失。

2011年6月至2013年7月（26个月）的工资	745,875.00新加坡元
2012年酌情奖金	250,000美元
2013年7个月酌情奖金	145,833.33美元
总计	765万港元

## 原告获得多少诉讼费用？

原告请求法院判决被告支付基于补偿标准的诉讼费用。法官认为，被告在审判中的行为令人非常不快，诉讼中某些重要的电子邮件直至很晚才被披露。此外，在诉讼过程中，被告没有安排现实的“交涉者”，而是通过Jefferies集团一个身份不明的成员来回应原告合理的解决提议。法院认定被告的此等行为既无用又缺乏建设性。

法庭命令被告向原告支付基于补偿标准的诉讼费用，这种补偿标准为原告提供了高于正常诉讼费用规模的赔付标准。

## 对于用人单位来说，“应吸取的教训”是什么？

在香港，如果用人单位不能证明其解雇员工的理由有效，那么以往典型的补偿方式是用人单位支付员工“终止款”。终止款实际上是用人单位在终止员工雇佣关系时，员工本应得到的法定与合同权利。

Jefferies案表明用人单位在员工在职期间违反默示条款解雇员工可能需向员工支付巨额赔偿。

用人单位在处理员工事宜时须谨慎小心，避免做出非理性行为。也就是说，用人单位应确保其对员工的行动基于合理的依据。