

Digging for Trouble: The Double-Edged Sword of Decisions to Report Misconduct

Update

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On May 10, 2024, Romy Andrianarisoa, former Chief of Staff to the President of Madagascar, was convicted for soliciting bribes from Gemfields Group Ltd (Gemfields), a UK-based mining company specializing in rubies and emeralds. Andrianarisoa, along with her associate Philippe Tabuteau, was charged after requesting significant sums of money and a five percent equity stake in a mining venture in exchange for facilitating exclusive mining rights in Madagascar.

The investigation, spearheaded by the UK's National Crime Agency (NCA), began when Gemfields reported their suspicions of corruption. Using covert surveillance, the NCA recorded Andrianarisoa and Tabuteau requesting 250,000 Swiss Francs (approximately £215,000) and a five percent equity stake, potentially worth around £4 million, as payments for their services. Gemfields supported the investigation and prosecution throughout.

During the investigation, six covertly recorded audio clips were released, suggesting Andrianarisoa had significant influence over Madagascar's leadership and her expectation of substantial financial rewards. The arrests in August 2023 and subsequent trial at Southwark Crown Court culminated in prison sentences of three and a half years for Andrianarisoa and two years and three months for Tabuteau.

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Gemfields has, quite rightly, been praised for reporting this conduct to the NCA and supporting their investigation and prosecution. In doing so, they made a strong ethical decision and went above and beyond their legal obligations: there is no legal requirement on Gemfields to report solicitations of this kind.

Such a decision will also have been difficult. Reporting misconduct and supporting the investigation is likely to have exposed Gemfields to significant risk and costs:

- First, in order to meet their obligations as prosecutors, put together the best case, and comply with disclosure requirements, the NCA likely required Gemfields employees to attend interviews and provide documents. These activities require significant legal support and can be very costly both in time and money.
- Secondly, such disclosures and interviews might identify unrelated matters of interest to the NCA. It is not uncommon in these cases for corporates reporting misconduct to become the subject of unrelated allegations of misconduct and separate investigations themselves.
- Furthermore, to the extent that Gemfields supported the covert surveillance aspects of the NCA's investigation, there may have been significant safety risks to both the employees participating, and unrelated employees in Madagascar. Such risks can be extremely difficult to mitigate.
- Finally, the willingness to publicly and voluntarily report Andrianarisoa is likely to have created a chilling effect on Gemfields' ability to do legitimate business in Madagascar and elsewhere. Potential partners may be dissuaded from working with Gemfields for fear of being dragged into similar investigations whether warranted or not.

Organisations in these situations face difficult decisions. Many will, quite rightly, want to be good corporate citizens, but in doing so, must recognise the potential costs and risks to their business and, ultimately, their obligations to shareholders and owners. In circumstances where there is no obligation to report, the safest option may be to walk away and carefully record the decision to do so. No doubt, Gemfields carefully considered these risks prior to reporting Andrianarisoa's misconduct.

Businesses facing similar challenges should:

- Ensure they understand their legal obligations. Generally, there is no obligation to report a crime. However, particularly for companies and firms operating in the financial services or other regulated sectors, this is not universally the case.
- Carefully consider the risks and benefits associated with any decision to report another's misconduct, including not only financial costs, but time and safety costs too.
- Develop a compliance programme that assists and educates teams on how to correctly identify misconduct, escalate appropriately, and decide whether to report.

