A guide to

Whistleblowing in Education

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Ensuring that workers feel empowered to raise concerns without fear of retaliation is crucial in any sector.

However, in the education sector, where the welfare and education of pupils and students is paramount and compliance with regulatory requirements is essential, the ability for employees to 'blow the whistle' is particularly crucial.

The law establishes stringent criteria for protecting whistleblowers, aiming to prevent employers from mistreating these individuals or obstructing their right to speak out. It is imperative that schools fully understand these stipulations, as mishandling or ignoring whistleblowing matters can lead to legal claims, harm, reputational damage, and other detrimental consequences.

This comprehensive guide is specifically tailored to address whistleblowing within educational settings. It will delve into employers' legal responsibilities, clarify what qualifies (and what does not qualify) as whistleblowing, and illuminate potential challenges and pitfalls associated with managing these complex and risky issues.

If you require expert support in handling whistleblowing matters in your educational institution, WorkNest's Employment Law specialists are ready to assist you. Please call us on **0345 226 8393** for pragmatic guidance and advice specific to your school and situation.

What is whistleblowing?

Whistleblowing is the act of reporting or exposing actual or suspected wrongdoing or illegal activity within an organisation or institution, typically by an insider or employee.

Background and legislation

Prior to 1998, there was no protection for people disclosing matters of public interest. However, a number of inquiries into disasters that occurred in the 80s and 90s – including Zeebrugge and Piper Alpha – highlighted that employees had been aware of the issues which led to these incidents but either hadn't reported them or had been dismissed for raising concerns.

In an attempt to prevent similar situations and improve standards, the Public Interest Disclosure Act 1998 (PIDA) came into force in July 1999. The Act, which was incorporated into the Employment Rights Act 1996, protects people from being subjected to detrimental treatment or dismissed as a result of raising a "protected disclosure" – a term we will define later in this guide.

When originally introduced, there was no mention of "public interest" in the legislation. It was assumed that all disclosures would inherently be made to benefit the general public or a significant portion of it, rather than serving purely personal or private interests, with the safeguard being "good faith". This led to a flurry of people claiming whistleblowing protection when, in reality, they had not been raising an issue relating to the public interest but rather a personal grievance.

This was especially common among individuals who did not have the two years' service required to claim protection against unfair dismissal. In some cases, pursuing a whistleblowing claim became the easier option due to the fact that whistleblowing doesn't have any minimum service requirements.

To combat this, whistleblowing legislation was amended for disclosures made from 25 June 2013 onwards. **This introduced the requirement that disclosures must be in the public interest** but **removed the requirement for disclosures to be made in good faith**, except in some limited circumstances.

On top of this, there is also the EU's Whistleblowing Directive, implemented in 2019. However, as the UK is no longer a member of the EU, UK organisations do not legally have to comply with this Directive when handling such matters.

It's important to note that whistleblowing legislation covers both employees and workers.

Is whistleblowing a concern in education?

The topic of whistleblowing in education has garnered attention in recent years. One article published by Schools Week in January 2024 shone a light on the significant number of individuals working within the sector who have suffered detriment or penalties for speaking out about malpractice. As a result, others are reluctant to come forward.

The article refers to recent findings by the charity Protect, which revealed that **72% of whistleblowers working in education have faced some form of detriment or harm as a result**. According to the report, "too many whistleblowers working in schools are ignored and victimised for raising public interest concerns".

Reflecting on her own experience, the author of the Schools Week article, Frances Akinde, said: "Speaking out is one of the most difficult things I've ever done. It has left me alone, emotionally and financially exposed, and facing an uncertain career future. But I'm convinced the lifelong harm I'd have suffered from remaining silent would have been far worse."

In our experience, whistleblowing claims are not uncommon occurrences within schools. There are numerous potential reasons for this, including the regulatory regime of schools, with targets, goals, outcomes, etc. within tight budgetary constraints, demands arising out of the inspection regime, and the general pressures on schools in both the public and private sector to deliver as 'businesses' whilst under intense scrutiny.

The kind of whistleblowing complaints we see cover issues such as perceived shortcuts being taken, manipulation of data to give a more favourable set of results or paint a picture, and concerns about health and safety risks within the school, particularly if they believe shortcuts are being taken to protect health and safety.

Why should schools have a whistleblowing policy?

For academies and multi-academy trusts (MATs), the Academies Financial Handbook requires the establishment of a whistleblowing procedure, which must be agreed upon and published on the trust's website.

The trust should appoint at least one trustee and one member of staff to whom other staff can report concerns. It must ensure all staff are aware of and understand:

- The whistleblowing process;
- How concerns will be managed;
- What protection is available to them if they report wrongdoing;
- What areas of malpractice or wrongdoing are covered in the procedure; and
- Who they can approach to report a concern.

The trust must ensure all concerns raised with them by whistleblowers are responded to properly and fairly.

Important reminder

For MATs and academies, please note the provisions in the Financial Handbook which enable a complainant to contact the ESFA if they believe the school/ trust did not handle their complaint in accordance with the published complaints procedure or acted unlawfully or unreasonably in the exercise of their duties under education law after they have completed Stage 3.

The ESFA will not normally reinvestigate the substance of complaints or overturn any decisions made by the school; however, they will consider whether the school has adhered to education legislation and any statutory policies connected with the complaint and whether they have followed Part 7 of the Education (Independent School Standards) Regulations 2014.

Even if your school is not an academy or part of a MAT, it is essential to implement a whistleblowing policy to mitigate potential risks.

As we will discuss later in this guide when examining the legislation, whistleblowers are afforded significant legal protection, and mishandling these matters could prove very expensive for schools.

Aside from the risks related to employment law, the more significant dangers lie in failing to address issues openly and transparently. In today's environment, it is increasingly difficult to conceal misconduct or wrongdoing. Even if a claim lacks merit, conducting an investigation can uncover problematic practices and provide valuable insights that lead to recommendations for improvement.

What is a ‘protected disclosure’?

Whistleblowing protection ensures that individuals who report **specific types of wrongdoing, in a specific way**, are protected from retaliation or dismissal for speaking out. These reports are known as protected disclosures.

For a disclosure to be considered ‘protected’, it must meet specific criteria regarding **how it is made and the nature of the concerns raised**.

Under the legislation, a ‘qualifying disclosure’ (protected disclosure) refers to:

- **Any** disclosure of **information**
- Which in the **reasonable belief** of the worker:

  i. is made in the **public interest**; and

  ii. tends to show **one or more** of the following:

  – That a criminal offence has been, is being or is likely to be committed, for example a school business manager raises concerns that another member of staff is stealing from the school.

  – That a breach of legal obligation has occurred, is occurring or is likely to occur, for example someone raises concerns that the school’s Facilities Manager is not properly conducting health and safety checks.

  – That a miscarriage of justice has occurred, is occurring or is likely to occur.

  – That the health and safety of any individual has been, is being or is likely to be endangered. For example, possible excessive workloads and demands on staff could be cited.

  – That the environment has been, is being or is likely to be damaged, for example someone reports that maintenance staff have been disposing of asbestos incorrectly.

  – That information tending to show any matter falling within one of the five categories has been or is likely to be deliberately concealed.

In addition, protected disclosures can:

- Be past, present, prospective or merely alleged.
- Concern the conduct of the employer, employee, or a third party.

It also doesn’t matter **where** the alleged conduct takes place, whether this is inside or outside of the workplace.

If a report does not meet the above criteria, it will not be protected under whistleblowing laws. Understanding this distinction is crucial because not every complaint constitutes a protected disclosure. Common workplace complaints, such as minor disputes or personal gripes, are unlikely to qualify for protection, meaning employers should address these under their grievance procedure.

‘Reasonable belief’

In whistleblowing cases, it is not necessary for the information disclosed to actually be true. What matters is that the whistleblower genuinely believes the information to be true or the situation to be a concern. This can be subjective and based on the whistleblower's perspective.

The Employment Tribunal will assess whether the belief in question was objectively reasonable – in other words, whether a reasonable person, in the same circumstances, would share the whistleblower's view of the concern or situation.

Note that it doesn’t matter if the belief is eventually proven to be wrong. For example, if a teacher reports concerns that their Head of Department is inflating grade figures, and a Tribunal finds that this is a reasonable view to hold, the employee would be protected even if it later transpired that this was not in fact happening.

How can disclosures be made?

Disclosures can be communicated in writing, orally, by video, or through a variety of other means.

However, from an evidential standpoint, it is preferable that disclosures are documented in writing or some other recorded format to ensure clarity and avoid disputes over content.

To whom can disclosures be made?

To become a protected disclosure, concerns must be disclosed to:

- **The employer:** Disclosures made directly to the employer are protected under whistleblowing laws.
- **'Responsible persons':** Disclosures to a responsible person are protected if the worker reasonably believes that the wrongdoing relates primarily to the conduct of that individual or falls within their legal responsibility rather than the employer's. For instance, if an employee suspects an Ofsted inspector of malpractice covered by whistleblowing laws, they can report this directly to Ofsted (the responsible person) instead of their employer, and it would still be considered a protected disclosure.
- **Legal advisers:** Disclosures made to legal advisers are also protected under whistleblowing laws.
- **Government Ministers:** If the worker is employed by an individual or entity appointed by any legislation (e.g. the Department of Education), disclosures can be made directly to government ministers. This allows whistleblowers employed in specific government agencies or bodies to report concerns directly to higher authorities and still be protected under whistleblowing laws.
- **'Prescribed persons':** Prescribed persons are individuals or bodies named on a published list. Disclosures made to these individuals will be protected if the whistleblower reasonably believes that the matter lies within the remit of the prescribed person, and that the information disclosed and any allegations contained in it are substantially true.

For example, suppose a school bursar learns from a colleague about concerns that the Headteacher has been transferring documents to their home computer. The bursar then raises these concerns with the Information Commissioner's Office (ICO), alleging potential data protection breaches by the Headteacher. This would be considered a qualifying disclosure to a prescribed person (the ICO) if the bursar reasonably believes the information from the colleague tends to show that the Headteacher is breaching data protection laws. However, to qualify for protection, the bursar must demonstrate that they reasonably believed the disclosed information to be substantially true. This means they should have attempted to verify their colleague's allegations before contacting the ICO.

'Wider disclosure'

Wider disclosure refers to a scenario where a worker discloses certain information outside of the specified channels (such as to their employer, a responsible person, or a prescribed person) and still seeks protection under whistleblowing laws.

In these circumstances:

- The worker must reasonably believe that the information disclosed is substantially true.
- The disclosure must not be made for personal gain.
- The worker's decision to make the wider disclosure must be reasonable considering the circumstances.

Additionally, the worker must meet one of the following conditions:

- Previously disclosed substantially the same information to the employer.
- Reasonably believes they will face detriment if they disclose to the employer or prescribed person.
- Reasonably believes that the material will be concealed or destroyed if disclosed to the employer, especially where there is no prescribed person available.

In exceptionally serious cases where the disclosed wrongdoing poses significant risks to public safety, national security, or involves serious criminal activities, the usual restrictions on wider disclosure may be relaxed. This means that whistleblowers may be justified in reporting their concerns to external authorities, the media, or other relevant parties, even if they have not followed the standard reporting procedures set out in the law.

This prioritises the resolution of critical issues over strict adherence to procedural requirements, recognising that certain situations may necessitate urgent action and broader disclosure to ensure that the wrongdoing is promptly addressed and prevented from causing further harm.

How should schools respond to whistleblowing reports?

Receiving reports of alleged dishonest, illegal, or dangerous practices within your school can be daunting. However, it is crucial that you do not ignore or dismiss these complaints.

When a protected disclosure is received, it is vital that employers treat it seriously and respond promptly. It is advised to:

- **Hold a meeting with the whistleblower** to understand the exact nature of the malpractice or wrongdoing. It may be necessary to ask them to provide a statement detailing the basis for their claim.
- **Make it clear that their disclosure will not affect their position at work** and provide whatever support they require while matters are investigated, as workers are likely to experience a great deal of anxiety about speaking out.
- **Investigate the disclosure by interviewing relevant witnesses** – maintaining confidentiality at all times – and gathering evidence that both supports and challenges the allegations.
- **Once investigations have concluded, write to the worker** who made the disclosure to inform them of the outcome and the basis for your decision.
- **If the worker's claims are not found to be substantiated, ensure they are in no way penalised for making the disclosure**, unless it can be shown that the worker has deliberately lied or created false information out of malice.
- **If the worker's claims are upheld, you must take appropriate action.** This may include reporting the matter to an appropriate authority or government department and taking disciplinary action against those involved in wrongdoing.

☆ Top tip

It is a good idea to keep a record of any whistleblowing disclosures you receive and details of your investigations, as this will allow you to demonstrate that the employee's concerns were taken seriously. It will also allow you to monitor the situation and take further action if necessary.

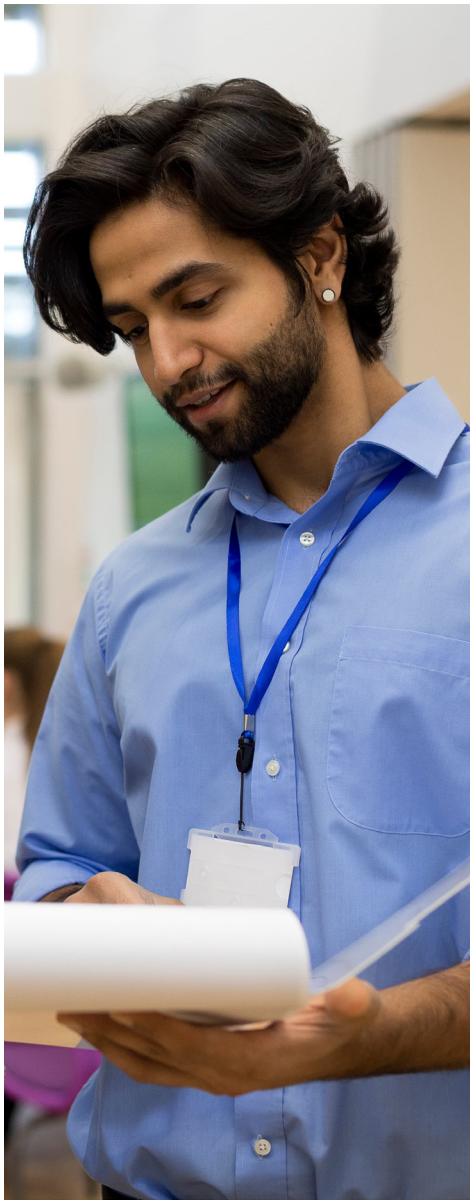
Can schools stop staff from speaking out?

As the Schools Weekly article spotlights, whistleblowers in education often face repercussions for speaking out. When individuals blow the whistle, employers may attempt to silence them out of concern for potential reputational risks if the information becomes public.

The author of the Schools Week article comments that "so many school leaders, current and former, have contacted me to share that if they didn't take an NDA, they would no longer be working in education". This is an interesting observation because not all NDAs or confidentiality clauses are enforceable. This is because such clauses which seek to prevent an individual from making a protected disclosure, as defined by Section 43A of the Employment Rights Act 1996 (ERA 1996), are void.

This means that if an issue is considered whistleblowing (a protected disclosure), NDAs or SAs can't be used to silence the employee. If, on the other hand, the concern does not qualify as whistleblowing and does not meet the criteria of a protected disclosure, an NDA may potentially be used to keep these matters confidential.

This prohibition is also outlined in the Academies Financial Handbook. While SAs can be established, they cannot include clauses that restrict employees from making protected disclosures.



What sort of claims could an employee bring?

The type of claims that a disgruntled worker can bring if they have made a protected disclosure will depend on the person's status (for example, whether they are a worker or have employee status) and what repercussions they have suffered due to their whistleblowing.

Protection from detriment

In the UK, under Section 47B of the Employment Rights Act 1996, "a worker has the right not to be subjected to any **detriment**, or any deliberate failure to act, by his employer **done on the ground** that the worker has made a protected disclosure".

The Whistleblowing Commission Code of Practice lists the type of actions that could amount to a detriment. Examples include, but are not limited to:

- Failure to promote;
- Denial of training;
- Closer monitoring;
- Ostracism;
- Blocking access to resources;
- Unrequested re-assignment or re-location;
- Demotion;
- Suspension;
- Disciplinary sanction;
- Bullying or harassment;
- Victimisation;
- Dismissal (see below for more information);
- Failure to provide an appropriate reference; or
- Failing to investigate a subsequent concern.

If a worker believes they have suffered a detriment as a result of whistleblowing, they can bring a claim before a Tribunal to seek remedies and compensation. No qualifying service is required.

The Tribunal will assess whether the employer's actions constituted a detriment and whether they were motivated by the worker's protected disclosure.

A successful claim for detriment can result in remedies such as compensation for financial losses, reinstatement or re-engagement (if applicable), and other forms of relief to address the harm caused by the detrimental treatment.

It's important to note that the protection against detriment does not apply if the detrimental treatment in question is **dismissal**. This is because if an employee is dismissed in retaliation for making a protected disclosure (i.e. whistleblowing), the appropriate remedy is a claim for **automatic unfair dismissal** rather than a claim for detriment.

However, in these situations:

- The employee may still have a separate claim against the employer for detriment up to the date of dismissal.
- The employee may have a claim for detriment against any colleague involved in the decision to dismiss them (alongside the unfair dismissal claim against the employer), and compensation for such a claim might include post-dismissal losses.
- A worker who is not an employee can bring a claim for detriment based on the termination of their contract. In such cases, their compensation must not be more than a Tribunal would have awarded if the claim had been one of unfair dismissal.

Timis v Osipov

As mentioned above, a claim for detriment cannot, in theory, include dismissal as the detriment. For that, a claim should be brought against the employer for automatic unfair dismissal.

However, in the case of *Timis v Osipov*, the Court of Appeal decided that dismissal **can be a detriment** if bringing a claim against an individual.

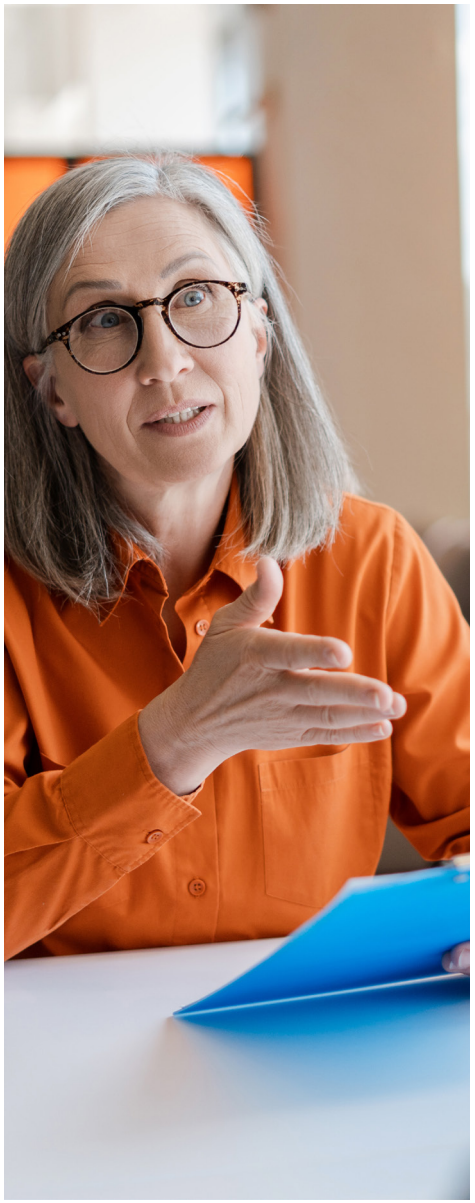
This has the effect of entitling a claimant to claim injury to feelings and potentially relaxing the burden of proof.

Personal and vicarious liability

As well as detriment claims and claims for unfair dismissal, it is also possible for:

- The employer to be held **vicariously liabl**e for one of their own employee's or worker's actions; and
- An individual to be held **personally liable**.

What are the dangers of dismissing whistleblowers?



Dismissing employees in retaliation for making protected disclosures (whistleblowing) poses significant legal risks and consequences for employers. Section 103A of the Employment Rights Act 1996 states that:

> *An employee who is dismissed shall be regarded... as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.*

This means that dismissal based on whistleblowing will be considered **automatically unfair**, thus helping to ensure that whistleblowers aren't penalised for speaking out against wrongdoing in the workplace.

In addition:

- **Unlike standard unfair dismissal claims, there is no minimum length of service required for a claim of automatic unfair dismissal related to whistleblowing.** This is important as it allows employees who are dismissed for whistleblowing to seek legal recourse without a service qualification barrier.
- **Compensation for unfair dismissal due to whistleblowing is uncapped**, i.e. it is not subject to the usual statutory limits on unfair dismissal compensation. This means that the compensation awarded can reflect the full extent of the losses suffered by the whistleblower as a result of their dismissal.
- **As mentioned above, even though workers cannot generally claim detriment for dismissal, there may still be circumstances where termination of employment can be considered a detriment.** For example, if the termination is accompanied by other unfair treatment or detrimental actions related to the protected disclosure, such as denial of benefits or negative references impacting future employment prospects, workers may have grounds to claim that the termination amounted to a broader detriment beyond the dismissal alone.
- **In unfair dismissal claims related to whistleblowing, the burden of proof varies depending on the employee's length of service:**
  - If the employee has the qualifying service to bring an unfair dismissal claim (usually two years of continuous employment), it is the employer's responsibility to demonstrate that the reason for dismissal was not related to whistleblowing.
  - If the employee does not have the qualifying service, it is the employee's responsibility to show that the reason for dismissal was directly linked to whistleblowing.
- **In whistleblowing cases, dismissal claims can also encompass constructive dismissal.** If an employee feels compelled to resign from their position due to intolerable working conditions resulting from whistleblowing, they may have grounds to claim that the employer has fundamentally breached their employment contract.

What compensation could whistleblowers receive?

As stated above, the law provides robust protections for workers who face adverse treatment or dismissal due to making protected disclosures. These provisions ensure that workers have access to remedies and compensation to address the impact of unfair treatment and maintain accountability for employers who fail to uphold whistleblowers' rights.

The table below outlines the possible awards in different types of whistleblowing claims.

Detriment claims

No qualifying service required.

☑ **Compensation (other than from dismissal):** Workers who experience detriment related to whistleblowing may be entitled to compensation for the losses they have incurred, such as financial losses or other damages resulting from the detrimental treatment.

☑ **Injury to feelings:** Detriment claims can also include compensation for injury to feelings caused by the detrimental treatment. This acknowledges the emotional impact of unfair treatment and provides additional remedies beyond financial losses.

☑ **No limit on compensation:** There is no statutory limit on the amount of compensation that can be awarded for detriment claims in whistleblowing cases. This allows for a fair and comprehensive assessment of the losses suffered by the worker due to the detrimental treatment.

Dismissal claims

No qualifying service required.

☑ **Basic award:** In addition to compensation for financial losses, dismissed workers may be entitled to a basic award, calculated based on their age, weekly pay, and length of service.

☑ **Notice period compensation:** Dismissed workers may also receive compensation equivalent to the notice period that they would have been entitled to if properly dismissed.

☑ **Stigma / loss of career damages:** Dismissal claims can encompass damages for stigma or loss of future career opportunities resulting from the unfair dismissal, acknowledging the broader impact on the worker's professional reputation and prospects.

☑ **No limit on compensation:** Similar to detriment claims, there is no statutory limit on the compensation that can be awarded for unfair dismissal related to whistleblowing.

☒ **Injury to feelings:** Unlike detriment claims, compensation for injury to feelings is not available in unfair dismissal claims related to whistleblowing. Instead, the focus is on financial losses and other tangible damages resulting from the unfair dismissal.

☑ **Interim relief:** If granted by the court, interim relief allows the employee to continue receiving pay and benefits and preserves continuity of service pending a full hearing.

☑ **Reinstatement/ re-engagement:** If successful in their unfair dismissal claim, workers may be reinstated or re-engaged in their previous position.

Note that compensation may be reduced if there has been a breach of the Acas Code of Practice or there is a lack of good faith.

Specialist support for schools

While no employer wants to discover malpractice within their organisation, schools shouldn't fear whistleblowing disclosures. Encouraging workers to raise genuine concerns in good faith will help to promote a transparent and open relationship and allow you to take timely action against those responsible, which will put you in better position to limit reputational, financial and legal damage.

When faced with whistleblowing disclosures or grievances which may or may not amount to protected disclosures, seeking advice at the earliest opportunity is key.

If you require support, our Employment Law specialists can guide you through the process and provide valuable reassurance that disclosures are handled appropriately. We can also help you to create a whistleblowing policy to keep you on the right track. In the event that a claim arises, our expert Litigation Team can assist with dealing with the defending such claims and the assessment of risk.

For support from our dedicated Education Team, contact us on:

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